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Teaching Freedom: Exclusionary Rights of Student Groups

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Teaching Freedom: Exclusionary Rights of Student Groups

Joan W. Howarth*

Progressive, antistatutory values support robust First Amendment protection for high school and university students, including strong rights of expressive association, even when those rights clash with educational institutions' nondiscrimination policies. The leading cases addressing the conflicts between nondiscrimination policies and exclusionary student groups are polarized and distorted by their culture war context. That context tainted the leading authority, Boy Scouts of America v. Dale, and is especially salient in the student expressive association cases, many of which are being aggressively litigated by religious groups with strong antihomosexuality goals. The strength of these First Amendment claims can be difficult to recognize in this context. Dean Howarth attempts to hold new ground, in which protecting the First Amendment association rights of exclusion by even antihomosexual student groups is consistent with a deep commitment to improved justice for sexual minorities. Dean Howarth discusses the leading high school and law school cases, and presents the strong First Amendment doctrinal analysis that should control. She critiques as weak the equality claim at stake in preventing a faith-based student group from limiting its membership and officers to adherents of that faith. To the contrary, nondiscrimination and equality for sexual minorities may be strengthened by greater separation between the expressive identities of educational institutions and those of student groups in the public forums

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established by the schools or universities. This is especially true in light of Establishment Clause developments that now protect religious groups within public schools and universities. Further, implementation principles can control the discriminatory impact within an institution of a discriminatory student group. In sum, forcing faith-based student organizations to abide by school or university nondiscrimination policies does not significantly advance equality and nondiscrimination rights for sexual minorities. Recognizing the First Amendment rights of even antihomosexual student organizations may be, in fact, the better path to LGBT rights and school environments in which LGBT students will have the safety, security, and support in which they can thrive.

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INTRODUCTION

Who should win when student groups' First Amendment expressive rights clash with schools' nondiscrimination policies? This conflict arises when faith-based student organizations assert their rights to exclude students who do not subscribe to the groups' statements of faith, in apparent violation of the educational institution's policies prohibiting religious discrimination. If the religious group's creed includes opposition to homosexuality, the group's insistence on limiting membership to those who accept the creed may also implicate institutional policies prohibiting discrimination based on sexual orientation. When the school has established a limited public forum and the group's exclusionary criteria is central to its identity, expressive association rights should trump nondiscrimination policies.

Once a school or university establishes a limited public forum of student organizations,¹ under the logic of *Roberts v. United States*

¹ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819

*Jaycees*² and *Rotary International v. Rotary Club of Duarte*,³ ideological or faith-based student groups have expressive association rights to use their ideology or faith as a membership requirement. For instance, the High School Democrats can limit their membership and leadership to people who agree with the Democratic party, otherwise known as Democrats; the Vegetarian Society can limit its membership to students who support vegetarianism, even limiting the group to students who pledge not to eat meat; and the Christian Legal Society ("CLS") should be able to limit its membership and leadership to people who share its version of the Christian faith.

Few of us would spend much energy defending the right of a person who eats bacon for breakfast, burgers for lunch, and steak for dinner to become the President of the Vegetarian Society. Turning over the core values of the Vegetarian Society to meat-lovers could compromise its agenda beyond recognition. That, in short, explains why the First Amendment protects the right of expressive associations to exclude from membership and leadership those who do not support the core values of the association. The vegetarian example is simple, however, because educational institutions generally do not have policies that prohibit discrimination against carnivores. The issues are more complex when the school's nondiscrimination policy comes into play, such as if the CLS wants to restrict its membership to people who accept its doctrine, in apparent violation of a policy prohibiting discrimination based on religion or sexual orientation.

Others also have argued that the First Amendment protects the right of student organizations in a limited public forum to control their membership based on the group's faith or ideology,⁴ but this Article

(1995) (explaining that university created limited public forum by funding multiple student newspapers with diverse perspectives).

² 468 U.S. 609 (1984).

³ 481 U.S. 537 (1987).

⁴ See, e.g., Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 UC DAVIS L. REV. 653 (1996) (discussing interaction between Establishment Clause and First Amendment freedom of speech); Charles J. Russo and William E. Thro, *The Constitutional Rights of Politically Incorrect Groups: Christian Legal Society v. Walker as an Illustration*, 33 J.C. & U.L. 361 (2006) (exploring *Walker* in light of constitutional rights of "politically incorrect" collegiate organizations); Note, *Leaving Religious Students Speechless: Public University Antidiscrimination Policies and Religious Student Organizations*, 118 HARV. L. REV. 2882 (2005) (arguing that applying nondiscrimination policies that directly conflict with the core values of religious student groups challenges First Amendment protected freedom of association); Richard M. Paul III & Derek Rose, Comment, *The Clash Between the First Amendment and Civil Rights: Public University Nondiscrimination Clauses*, 60 MO. L.

may be distinctive in two ways. First, my analysis rests in part on skepticism about the line of Establishment Clause authority that has invited faith-based student organizations into public schools and universities.⁵ Second, and perhaps more fundamentally, my argument is grounded in a deep commitment to equality and improved justice for members of the lesbian, gay, bisexual, and transgender (“LGBT”) communities. But forcing faith-based student organizations to abide by school or university nondiscrimination policies does not significantly advance equality and nondiscrimination rights for sexual minorities. To the contrary, recognizing the First Amendment rights of even antihomosexual student organizations may be, in fact, the better path to LGBT rights and school environments in which LGBT students will have the safety, security, and support in which they can thrive.

Progressive, antisubordination values support robust First Amendment protection for high school and university students, including strong rights of expressive association. *Morse v. Frederick*,⁶ *Hazelwood School District v. Kuhlmeier*,⁷ and *Tinker v. Des Moines Independent Community School District*⁸ have established that “the

REV. 889 (1995) (exploring right of university religious organizations to discriminate based on sexual orientation); Mark Andrew Snider, Note, *Viewpoint Discrimination by Public Universities: Student Religious Organizations and Violations of University Nondiscrimination Policies*, 61 WASH. & LEE L. REV. 841 (2004) (examining how court should reconcile derecognized student organization's freedom of association with university's goal of total nondiscrimination on campus); Ryan C. Visser, Note, *Collision Course?: Christian Legal Society v. Kane Could Create a Split over the Right of Religious Student Groups to Associate in the Face of Law School Antidiscrimination Policies*, 30 HAMLINE L. REV. 449 (2007) (considering potential circuit split regarding whether CLS should be required to follow university nondiscrimination policies); cf. Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994) (arguing that religious student organization had RFRA rights, grounded in equal access and free exercise, to exemption from university policy prohibiting discrimination on basis of sexual orientation). But see, e.g., Anne K. Knight, Note, *Striking the Balance Between Anti-Discrimination Laws and First Amendment Freedoms: An Alternative Proposal to Preserve Diversity*, 30 T. JEFFERSON L. REV. 249 (2007) (forcing student groups to comply with nondiscrimination policies does not violate First Amendment); Christian A. Malanga, Note, *Expressive Association — Student Organizations' Right to Discriminate: A Look at Public Law Schools' Nondiscrimination Policies and Their Application to Christian Legal Society Chapters*, 29 W. NEW ENG. L. REV. 757 (2007) (arguing that notwithstanding groups' First Amendment expressive rights, enforcement of nondiscrimination policies on CLS chapters and other religious-based student groups is justified).

⁵ See *infra* text accompanying notes 145-54.

⁶ 127 S. Ct. 2618 (2007).

⁷ 484 U.S. 260 (1988).

⁸ 393 U.S. 503 (1969).

rights of students 'must be "applied in light of the special characteristics of the school environment.'"⁹ High schools (and later colleges and universities) are training grounds for participatory democracy, particularly as they provide opportunities for students to experience and grow into values of autonomy, pluralism, and equality.¹⁰ The most crucial special characteristics of the school environment are those that reinforce the school's role as launching pad for effective participation in a vibrant democracy.¹¹

The First Amendment protects expressive associations because they are identity-forming, idea-forming entities.¹² This is why encouraging a variety of autonomous student groups is a central aspect of many schools' missions of preparing students to participate effectively in democracy. As Seana Shiffrin aptly claims, "Associations have an intimate connection to freedom of speech values in large part because they are special sites for the generation and germination of thoughts and ideas."¹³ Expressive associations create opportunities for self-expression, advocacy, tolerance, and autonomy. Schools may teach those values best by facilitating public forums for student organizations.

The link between First Amendment freedoms and democratic participation attaches high value to students' free expression, including student control of student organizations, even when those student rights conflict with institutional nondiscrimination policies. Just as training wheels do not guarantee the safety of novice bike riders, educational laboratories for democracy cannot eliminate all risks of freedom or complexities of equality. Pluralism and freedom do not translate into a right not to be offended or even hurt.¹⁴ In

⁹ *Morse*, 127 S. Ct. at 2622 (quoting *Hazelwood*, 484 U.S. at 266 (internal citations omitted)).

¹⁰ *Hazelwood*, 484 U.S. at 278 (Brennan, J., dissenting) (discussing role of public schools in educating young citizens on importance of participating in democracy).

¹¹ See generally Colin M. Macleod, *A Liberal Theory of Freedom of Expression for Children*, 79 CHI.-KENT L. REV. 55 (2004) (theorizing about preparing children for adult roles in democracy).

¹² See generally Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 Nw. U. L. REV. 839 (2005) (arguing that First Amendment value of expressive association is grounded not as much on external message of association as it is on association as site for development of autonomous thought); *id.* at 840-41 (describing expressive associations as "special sites for generation and germination of thought and ideas").

¹³ *Id.* at 840-41.

¹⁴ Andrew Koppelman, *You Can't Hurry Love: Why Anti-discrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOK. L. REV. 125, 144-45 (2006) (challenging notion that "none of us needs to hear things that will hurt us"); *id.* at 126 ("[C]onservative Christians . . . like gay people, should be able to say what they

addition, we diminish our lessons about equality by insisting to students that equality means the right of a Republican to join the Democratic Club, the right of a meat-lover to join the Vegetarian Society, or the right of a Muslim to lead the CLS.

The Second and Ninth Circuits have addressed conflicts between high school religious student organizations and nondiscrimination policies in *Hsu v. Roslyn Union Free School District No. 3*,¹⁵ and *Truth v. Kent School District*,¹⁶ respectively. *Hsu* upheld the right of a high school Christian organization to limit its officers to Christians,¹⁷ but the court in *Truth* was deeply skeptical of any right of a Christian student group to limit its membership to Christians. The CLS has pressed similar issues at law schools across the country, achieving many negotiated victories,¹⁸ a Seventh Circuit victory in *Christian Legal Society v. Walker*,¹⁹ and a defeat in the Northern District of California in *Christian Legal Society v. Kane*,²⁰ currently on appeal to the Ninth Circuit.²¹ The CLS cases escalate the intensity of the

believe, however distressing that may be to their fellow citizens.”).

¹⁵ 85 F.3d 839 (2d Cir. 1996).

¹⁶ 542 F.3d 634 (9th Cir. 2008) [hereinafter *Truth II*], amending 524 F.3d 957 (9th Cir. 2008), vacating *Truth v. Grohe*, 499 F.3d 999 (9th Cir. 2007) [hereinafter *Truth I*].

¹⁷ See *infra* text accompanying notes 39-62.

¹⁸ The CLS claims victories through negotiation or settlement of litigation at the University of South Carolina (see Press Release, ADF, CLS Suit Prompts Univ. of S.C. to Correct Funding Inequities (June 23, 2008), available at <http://www.alliancedefensefund.org/news/story.aspx?cid=4577> (last visited June 26, 2008)); Florida State University (see Press Release, Christian Legal Society, Florida State Student Senate Reverses Its Decision to Pull Funding from Christian Legal Society (Feb. 28, 2008), available at http://www.clsnet.org/clrfPages/pr_CLSvFSU.php); Ohio State University (see *New Ohio State Policy Allows Religious Groups to Exclude Non-Believers*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 1, 2004, at 1, available at LexisNexis Congressional Universe Academic); University of Toledo (see Plaintiff's Notice of Voluntary Dismissal Without Prejudice, *Christian Legal Soc'y Chapter of the Univ. of Toledo v. Johnson*, No. 3:05-CV-7126 (N.D. Ohio June 17, 2005)); and Arizona State University (see Plaintiff's Memorandum of Points and Authorities in Support of Its Motion for Attorneys' Fees and Costs, *Christian Legal Soc'y at Arizona State Univ. v. Crow*, No. CV-04-2572-PHX-NVW (D. Ariz. Nov. 7, 2005)).

¹⁹ 453 F.3d 853 (7th Cir. 2006).

²⁰ No. C 04-04484JSW, 2006 U.S. Dist. LEXIS 27347 (N.D. Cal. Apr. 17, 2006).

²¹ The Eleventh Circuit is poised to address a very similar issue in *Beta Upsilon Chi, Upsilon Chapter at the University of Florida v. Machen*. In *Machen*, a Christian Fraternity challenged the University of Florida's efforts to enforce its nondiscrimination policies against it. *Beta Upsilon Chi, Upsilon Chapter at the Univ. of Fla. v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008), argued, No. 08-13332-EE (11th Cir. Dec. 10, 2008). The 11th Circuit appeal of the district court denial of the fraternity's motion for a preliminary injunction is pending. On July 30, 2008, the 11th Circuit issued an order without opinion granting the fraternity's interlocutory

political conflict beyond that of the high school cases because the CLS statement of faith limits membership and leadership to people who renounce sexual activity outside of marriage, including all same-sex sexual activity.²² Although the CLS denies that this aspect of its creed constitutes discrimination based on sexual orientation, law schools have challenged the CLS position as violating not only their prohibitions against religious discrimination, but also their prohibitions against discrimination based on sexual orientation.²³

Part I of this Article describes the leading decisions that address the tension between nondiscrimination policies and student organizations' exclusionary rights. The polarization of these decisions, greatly assisted by weaknesses in *Boy Scouts of America v. Dale*,²⁴ suggests that this difficult expressive association question is in danger of being improperly reduced to a simplistic referendum on LGBT rights. In some quarters, appreciation for expressive association rights of student groups is being rendered collateral damage in American culture wars. This Article attempts to take new ground, in which protecting the First Amendment association rights of even antihomosexual student organizations is consistent with a deep commitment to improved justice for sexual minorities.

Part II provides the doctrinal analysis that should be controlling. First, although the fact that religion is both an identity and a belief system complicates the question, courts should recognize that denying only faith-based student groups the ability to constitute themselves based on core belief is viewpoint discrimination. Second, a group controlling its own message through exclusion of would-be nonconforming members is engaged in the kind of conduct that should receive full First Amendment protection. Third, the fact that student groups are expressive associations within limited public forums set up by schools and universities should not fatally undermine the force of those groups' expressive association claims.

"Time Sensitive Motion for Injunction Pending Appeal." Corrective Order, *Machen*, No. 08-13332-EE (11th Cir. Jul. 30, 2008) (granting appellants' motion).

²² The growing availability of same-sex marriage will have little impact on CLS policies regarding homosexuality, as the CLS is unlikely to recognize the validity of same-sex marriage. See, e.g., The Center for Law & Religious Freedom, The Advocacy Ministry of the Christian Legal Society, The Center Blog: Same-Sex-Marriage, <http://religiousfreedom.blogspot.com/search/label/Same-Sex-Marriage> (last visited Nov. 30, 2008) (including blog postings commenting on how the evolving context concerning same-sex marriage will not significantly affect CLS policies regarding homosexuality).

²³ E.g., *Walker*, 453 F.3d at 860; *Kane*, 2006 U.S. Dist. LEXIS 27347, at *4.

²⁴ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

Finally, in this context, exclusion from membership on the basis of belief (that homosexuality is good) and exclusion on the basis of behavior (actively engaging in homosexuality) should be distinguished from exclusion on the basis of status or identity (being homosexual).

Part III interrogates the equality claim at stake in enforcement of nondiscrimination policies in these controversies, and finds it to be weak. The principle of equality or nondiscrimination that insists on the right of Democrats to join the Young Republicans, or homophobes to join the Gay-Straight Alliance, or people who do not subscribe to the CLS statement of purpose to join the CLS, is an overly formal, inconsequential, empty version of equality. Many defenders of nondiscrimination policies in these conflicts tend to overvalue the equality right at stake because of its usefulness as a symbol of support for LGBT people, but more meaningful and less costly symbols would be preferable.

Part IV develops the claim that conceptualizing the viewpoint and identity of the educational institution as distinct and separate from the viewpoint and identity of the exclusionary student organization is appropriate and necessary, and promotes three important collateral First Amendment goals. First, separation-of-church-and-state values are strengthened when public schools and universities distance their own expressive identities from the expressive identities of faith-based student groups permitted under current Establishment Clause doctrine. Next, recognizing the conceptual distance between the expressive identity of the institution and of the student group in this context offers a better and more consistent defense against the apparently growing pressure to require student speech to conform to the educational institution's values or mission.²⁵ Third, clearly delineating the difference between the voice of the student organization and the voice of the educational institution may help to rehabilitate the expressive identity of the educational institution, which the Court found hard to recognize in *Rumsfeld v. FAIR*.²⁶

Part V suggests several limiting principles and operational guidelines for schools and universities when implementing

²⁵ Brief of Petitioner at 20-25, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 118979; Reply Brief of Petitioners at 10, *Morse*, 127 S. Ct. 2618 (No. 06-278), 2007 WL 747754; see, e.g., Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public High School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111 (2008) (warning against limiting student speech based on conformity to schools' educational mission).

²⁶ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69-70 (2006).

exclusionary rights of student organizations. The Conclusion reaffirms the strategic value to sexual minorities of principled protection of free expression for all students, even those deeply opposed to homosexuality. In sum, rather than focusing on limiting the expressive rights of antigay student groups, schools and universities should find more powerful ways to advance equality for LGBT students.

I. EXPRESSIVE ASSOCIATION AS BATTLEGROUND IN THE CULTURE WARS

A. *Resisting the Dale Invitation*

The expressive association doctrine in *Roberts*,²⁷ *Rotary*,²⁸ and *Dale*²⁹ requires balancing the strength of the state's interest in nondiscrimination against the intrusive impact of forced inclusion on the expressive association. This weighing almost inevitably invites judgments on the relative importance of whatever principle of nondiscrimination is at stake, whether based on religion, sexual orientation, or something else. However, the cases addressing religious student organizations' expressive association rights have moved beyond this doctrinal balancing. They have instead become markedly polarized battlegrounds in what Michael McConnell has identified as a "seemingly irreconcilable clash" between the rights and interests of sexual minorities and the beliefs of some religious people.³⁰ Antihomosexuality religious organizations are using aggressive litigation strategies to assert exclusionary expressive association rights.³¹ In reaction, and in the supercharged environment of the culture wars, Justice Scalia's "kulturkampf,"³² progressive people are undervaluing important free speech interests in their attempts to signal and create real support for LGBT equality. Willingness to fight the anti-homosexual religious groups has become

²⁷ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 610 (1984).

²⁸ *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 538 (1987).

²⁹ *Dale*, 530 U.S. at 648.

³⁰ Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 43-44 (2000).

³¹ The CLS, for example, has an aggressive and adamant litigation strategy to enforce the exclusionary rights of CLS chapters across the country. See Christian Legal Society Home Page, <http://clsnet.org> (last visited June 23, 2008).

³² See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

a sign of commitment to equality for LGBT students, obscuring the First Amendment principles at stake.³³

The United States Supreme Court bears a large share of the responsibility for the polarization of these cases; the Court's treatment of similar issues in *Dale* succumbed to precisely this dynamic. Under *Roberts* and *Rotary*, expressive associations have First Amendment rights to control their membership, but they can only trump nondiscrimination policies if identity exclusion is at the heart of their expressive purpose.³⁴ Thus, for example, under well-established analysis, the Ku Klux Klan could earn an exemption from prohibitions on race discrimination, because racism and hostility to people of color are central to its expressive identity.³⁵

In light of the strength of the state's statutory interest in enforcing equality for sexual minorities, to prevail in *Dale* the Boy Scouts should have had to establish that an antihomosexual message was central to their expressive identity.³⁶ Instead of a serious examination of the expressive association interests at stake, however, the Court permitted the Boy Scouts to use the intensity of their desire to kick out James Dale as a proxy for ideological commitment. *Dale* wrongfully undervalued the state's interest in nondiscrimination and inflated the Scouts' antihomosexual message, essentially giving the Scouts a free pass.

Dale also blurred the distinction between identity and ideology in unhelpful ways. *Dale* makes it harder to see the principle that expressive associations should be able to organize themselves on the basis of belief, because *Dale* issued a loose invitation to use identity-based exclusion (no homosexuals allowed) as a proxy for belief (we

³³ For example, the ACLU and the ACLU of Northern California entered the litigation between the CLS and Hastings College of Law as amicus curiae in support of Hastings, with analysis that properly recognized the very strong interest in nondiscrimination protection for LGBT students. See Brief for Am. Civil Liberties Union and Am. Civil Liberties Union of N. Cal. et al. as Amici Curiae Supporting Hastings at 3-4, *Christian Legal Soc'y v. Kane*, No. C 04-04484JSW (N.D. Cal. Apr. 17, 2006), 2006 U.S. Dist. LEXIS 27347. Surprisingly, however, for civil liberties organizations, this analysis found that no cognizable associational interest of the CLS was implicated. See *id.*

³⁴ *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 538 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984).

³⁵ In theory, under the logic of *Rotary* and *Roberts*, a student organization created precisely to advocate for exclusion or separation based on race, may have a First Amendment claim to discriminate on that basis in membership and leadership criteria. See *Duarte*, 481 U.S. at 538; *Roberts*, 468 U.S. at 618-19.

³⁶ For a particularly effective discussion of this point, see Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 604-12 (2001).

oppose homosexuality). Nowhere in *Dale* is there any evidence that the Boy Scouts remove heterosexuals who advocate in favor of homosexuality.³⁷ In other words, the Boy Scouts and the Court blurred any distinction between the ideological position of being anti-homosexuality, and the exclusion of homosexuals. *Dale* permitted the Boy Scouts to create an ideological position through discrimination. The Court allowed the Scouts' desire to discriminate to substitute for any established organizational antigay message or ideology that had predated litigation. This reduced the analysis to a referendum on equality for sexual minorities, in which equality mattered little. No wonder LGBT groups and civil liberties organizations are approaching the exclusionary student organization controversies with a passion to right the balance and restore LGBT nondiscrimination values. Unfortunately, this passion comes at the expense of expressive associational values.³⁸

B. Hsu and Truth: *The High School Cases*

The Second and Ninth Circuits have adopted very different approaches to the exclusionary rights of high school religious groups. The Second Circuit decision, *Hsu*,³⁹ concerned a proposed high school student club called "Walking on Water." The purpose of the club was Christian fellowship, including singing, prayer, discussion, study, and guest speakers, with an overarching goal of gathering "to praise God."⁴⁰ As originally proposed, the club would have restricted membership to Christians, but after negotiations with the school authorities, the students opted for the more limited requirement that officers "accept . . . Jesus Christ as savior."⁴¹ This proposed leadership requirement violated the school board's nondiscrimination policy, which provided that the

³⁷ For an excellent discussion of this point, see Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1602 (2001).

³⁸ A similar dynamic has led to an unfortunate lack of sensitivity to speech rights of antigay students. See, e.g., *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), *vacating as moot*, 127 S. Ct. 1484 (2007) (finding, in original opinion, no constitutional protection for antigay student speech); *Zamecnik v. Indian Prairie Sch. Dist.* # 204, No. 07 C 1586, 2007 U.S. Dist. LEXIS 94411 (N.D. Ill. Dec. 21, 2007) (evaluating First Amendment protection for "Be Happy, Not Gay" t-shirt that conflicted with high school tolerance policy); *Hansen v. Ann Arbor Public Sch.*, 293 F. Supp. 2d 780 (E.D. Mich. 2003) (upholding Christian student's right to express in "What Diversity Means to Me" program that she could not accept religious or sexual orientation diversity).

³⁹ 85 F.3d 839 (2d Cir. 1996).

⁴⁰ *Id.* at 849.

⁴¹ *Id.* at 849-50.

school board would not discriminate “on the basis of race, color, national origin, creed or religion, marital status, sex, age or handicapping condition” in providing “access to . . . student activities.”⁴²

Following *Hurley v. Irish American GLIB Ass’n*⁴³ and *Roberts* by analogy, the *Hsu* court recognized that the right of association includes a right not to associate,⁴⁴ and that the initiating students’ desire to control the leadership implicated expressive association rights. The court correctly noted that having leadership consistent with the specific goals of the club serves the purpose of any club: “The Club’s leadership eligibility requirement on the basis of religion is therefore similar to a chess club’s eligibility requirement based on chess. . . .”⁴⁵ “[M]any extracurricular clubs typically define themselves . . . by requiring that their leaders show a firm commitment to the club’s cause.”⁴⁶

The *Hsu* court properly grounded its analysis in the required nexus between the group’s purpose for existence and its desired exclusionary principles, noting that a “hypothetical chess club that excluded Muslims could not claim that the exclusion was necessary to guarantee committed chess players.”⁴⁷ The court determined that the

⁴² *Id.* at 850. A second provision guaranteed that no student would be excluded on those enumerated grounds from “extracurricular activities.” *Id.*

⁴³ 515 U.S. 557 (1995) (upholding First Amendment right of parade organizers to exclude gay Irish contingent).

⁴⁴ See *Hsu*, 85 F.3d at 858 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

⁴⁵ *Id.* at 860.

⁴⁶ *Id.* The court continued:

[I]t would be sensible — and unremarkable in light of the clubs’ particular purposes — for the Students Protecting the Environment Against Contamination Club to require that officers have a demonstrated commitment to conservation or recycling; for Students Against Drunk Driving to require that officers have taken the pledge; or for Students for Social Responsibility to require that officers have a social conscience. Similarly, a hypothetical school scouting club could preserve its character and values by requiring that officers be exemplars of the scouting movement, just as a hypothetical Marxist discussion group could require that officers be dedicated to socialist values or be card-carriers.

Id.

⁴⁷ *Id.* at 861 n.20. As Alan Brownstein noted at this symposium, a situation of a group based on avocation and exclusion, such as a Muslim Chess Club, is a more difficult question. In a public forum a Muslim Chess Club should be permitted to exclude those who do not fit both aspects of their core expressive identity. However, educational institutions faced with such a student group can institute policies to limit the institutional impact of such a group’s discrimination. See *infra* text accompanying notes 165-82.

exclusion must serve a "legitimate self-definitional goal for the group. This essential and direct link between the legitimate purpose of the club and the principle of exclusion necessary to achieve that purpose distinguishes the girls' soccer team and the Walking on Water Club from the hypothetical Chess Club."⁴⁸

In *Hsu*, the Second Circuit recognized that the club's Christian officer requirement, as applied to the President, Vice-President, and Music Coordinator, is "essential to the expressive content of the meetings and to the group's preservation of its purpose and identity, and is thus protected by the Equal Access Act."⁴⁹ The court described *Hurley* as "instructive," finding that the Christian identity of the leaders of the student group implicated the group's "speech" similarly to the way that inclusion of the group marching with a gay rights banner would impermissibly alter the *Hurley* parade organizers' "message."⁵⁰

The *Hsu* majority's main error was to parse too tightly the notion of which activities were "religious." The court found that "to the extent that such a group engages in social and community activities that are not integral to a sectarian religious experience, it is in danger of becoming merely a religious affinity group practicing social exclusion."⁵¹ In this vein, the court distinguished the more clearly worship-related speech activities at the meetings from the picnics and community service activities that the club had also proposed. Rejecting the plaintiffs' arguments that the Activities Coordinator would need to ensure that these activities did not offend "Christian sensibilities," the court declared that "an agnostic with an understanding of 'Christian sensibilities' might plan these activities as

⁴⁸ *Hsu*, 85 F.3d at 861 n.20.

⁴⁹ *Id.* at 848. The Equal Access Act prohibits public secondary schools that receive federal funding and that create a limited public forum for student organizations from denying equal access to students who want to conduct meetings based on the religious, political, philosophical, or other content of the speech at the meetings. Under the statute, a school has a "limited open forum" if it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(a)-(b) (1984). According to the *Hsu* decision, there is no legislative history on the application of the Equal Access Act to exclusionary membership policies. *Hsu*, 85 F.3d at 854-55. The court also concluded that "[t]his application of the Act is constitutional because the school's recognition of the club will not draw the school into an establishment of religion or impair the school's efforts to prevent invidious discrimination." *Id.* at 848.

⁵⁰ *Hsu*, 85 F.3d at 856-57. The *Hsu* court recognized that the "religious speech" of the club would be "in the nature of religious devotions." *Id.*

⁵¹ *Id.*

well as any other student.”⁵² Thus, the court determined that the group’s Activities Coordinator and Secretary no more needed to be Christian than anyone who attended the meetings, and that “a religious test for membership or attendance . . . [would be] plainly insupportable.”⁵³

The court concluded, “[i]t is difficult to understand how allowing non-Christians to attend the meetings and sing (or listen to) Christian prayers would change the Club’s speech.”⁵⁴ The *Hsu* majority overstepped by imagining that it could decide that the leadership of the Music Coordinator, for example, or the Secretary, need not be imbued with Christian faith. Secularizing the aspects of Christian fellowship that are furthest from traditional worship rituals may simply deliver a parched version of the Christian faith.⁵⁵

Nonetheless, the *Hsu* court properly found that treating the religious group equally with the secular groups, as required by the Equal Access Act, required recognizing that religion is a belief or ideology, in addition to being a status. “[J]ust as a secular club may protect its character by restricting eligibility for leadership to those who show

⁵² *Id.* “Similarly, it is very difficult to understand why the ‘religious speech’ at the Walking on Water Club meetings would be affected by having a non-Christian ‘Secretary,’ whose principal duties are ‘to accurately record the minutes of meetings and be involved in the Club’s financial accounting and reporting.’” *Id.*

⁵³ *Id.* at 858. The court erred in combining as if identical the constitutional questions related to membership and attendance. In conjunction with ordinary procedures for conducting a group’s business, mere attendance of nonbelievers holds little risk of misshaping the beliefs at the core of the group’s identity. Membership, however, brings opportunities to shape the organization, which means that First Amendment expressive association values are implicated. In his concurrence and dissent, Judge Van Graafeiland also suggested that the Walking on Water Club may be able to limit its membership to Christians. *Id.* at 873 (Van Graafeiland, J., concurring and dissenting) (citing *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988)).

⁵⁴ *Id.* at 858 n.17 (majority opinion). By this analysis, the Second Circuit separated the Activities Coordinator and the Secretary, who the court found did not need to be Christian, from the President, Vice-President, and Music Coordinator, who, by contrast, would ensure that the meetings would be “imbued with certain qualities of commitment and spirituality” to “make a certain kind of speech possible” and “affect the ‘religious . . . content of the speech at [the] meetings,’ within the meaning of the Equal Access Act.” *Id.* at 858 (footnote omitted).

⁵⁵ In his concurrence and dissent, Judge Van Graafeiland argued that because “the Club members are better qualified than are we to determine the duties and necessary qualities of all their leaders,” the Walking on Water Club should be permitted to impose the requirement of being Christian on all of its officers. *Id.* at 874 (Van Graafeiland, J., concurring and dissenting); cf. FRANK S. RAVITCH, *MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES* 83 (2007) (noting that when government funding comes with strings attached, religious values of religious entities may be compromised).

themselves committed to the cause, the [plaintiffs] may protect their ability to hold Christian Bible meetings by including the leadership provision in the club's constitution."⁵⁶ The court found that the plaintiffs' concern that "students inimical to the Club's purpose" could take over the club was speculative, but "by no means unreasonable."⁵⁷

Three additional weaknesses mar the *Hsu* majority opinion. First, the court attempted a too-easy distinction between a religious group's desire to exclude based on religious ideology and "excluding others out of bias."⁵⁸ Bigoted faiths exist. Second, the court asserted somewhat facilely that genuine religious grounds for exclusion will not stigmatize those excluded.⁵⁹ The actual interplay between religious conviction, bias, and the stigma of exclusion is more complex. Although exclusion based on religious non-belief may not always carry the same stigma as exclusion on grounds of hatred or racism, it can be quite severe.⁶⁰ Exclusion from religious community may carry with it the threat of eternal damnation, for example. Especially in the context of children and youth, exclusion for any

⁵⁶ *Hsu*, 85 F.3d at 861.

⁵⁷ *Id.* The *Hsu* court also suggested that the Equal Protection Clause would prevent clubs from discriminating against racial minorities, *see id.* at 867, that *Tinker* offers a strong tool for school officials to maintain good educational order, *see id.*, and that the congressional history of the Equal Access Act shows that it was not intended to protect "cults and hate groups." *Id.* at 867-68. The distinction between a protected religion and a nonprotected "cult" is suspect under First Amendment principles.

⁵⁸ *Id.* at 871.

⁵⁹ *Id.* Regarding the Equal Protection issue, the *Hsu* court found that

[n]othing in the record of the School's arguments suggest that the Walking on Water Club insists on Christian leaders because of animus against people of other religions. Since the Club exists solely to engage in Christian "praise of God," non-Christians suffer no articulable disadvantage by being unable to lead the Club's prayers and devotions. Nor is there any indication that the exclusion of non-Christians from Club leadership will subordinate or stigmatize them. Were any of these facts otherwise, the School might be justified in refusing an exemption from its nondiscrimination policy.

Id. at 869 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983)).

⁶⁰ FRANK S. RAVITCH, *SCHOOL PRAYER & DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES & DISSENTERS* 8-18 (1999) (citing *Lee v. Weisman*, 505 U.S. 577 (1992); *Illinois v. Bd. of Educ.*, 333 U.S. 203 (1948); *Bauchman v. W. High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Bell v. Little Axe Indep. Sch. Dist.* No. 70, 766 F.2d 1391 (10th Cir. 1985); *Religious Liberty: Hearings Before the S. Judiciary Comm.*, 104th Cong. 1 (1995) (prepared testimony of Reverend James Forbes) (describing how students may be traumatized for not aligning with religious majority in public school); *Complaint of Herring*, *Herring v. Key*, (M.D. Ala. 1997); *60 Minutes, Profile: Lisa Herdahl v. Pontotoc County: Mother Sues Public School over Prayer* (television broadcast June 16, 1996)).

reason may cause some stigma or hurt. Third, the court found that “[i]t is undisputed that the decision by the Walking on Water Club to impose a religious test for leadership positions has been made purely for expressive purposes — to guarantee that meetings include the desired worship and observance — rather than for the sake of exclusion itself.”⁶¹ What is exclusion for the sake of exclusion? Is there ever exclusion without a purpose?

The *Hsu* court presented what it declared to be a narrow holding:

[W]hen a sectarian religious club discriminates on the basis of religion for the purpose of assuring the sectarian religious character of its meetings, a school must allow it to do so unless that club's specific form of discrimination would be invidious (and would thereby violate the equal protection rights of other students), or would otherwise disrupt or impair the school's educational mission.⁶²

Although wrapped in qualifications, the central theme of *Hsu* is appropriately protective of discriminatory expressive associations in high schools.

The Ninth Circuit recently decided a similar set of issues very differently in *Truth*.⁶³ Like *Hsu*, *Truth* concerns a proposed Christian high school student group, in this case named “Truth,” which wanted

⁶¹ *Hsu*, 85 F.3d at 859. Revealing a perhaps naïve distinction between discriminatory motives and sound ones, the court declared that “an exclusion solely for reasons of hostility or cliquishness, with no direct bearing or effect on the group's speech, does not implicate the right to expressive association.” *Id.*

⁶² *Id.* at 872-73.

⁶³ In its first decision in *Truth*, 499 F.3d 999, 1016 (9th Cir. 2007), the Ninth Circuit panel (Judges Wallace, Wardlaw, and Fisher) resoundingly affirmed the summary judgment entered by the trial court in favor of the school district and other defendants. Following a petition for rehearing en banc, on April 25, 2008, the same panel withdrew the original opinion and replaced it with a decision that retained much of the earlier analysis, but reversed and remanded on the narrow question whether the plaintiffs could prove their allegation that the school district had impermissibly discriminated against religious groups by selectively enforcing its nondiscrimination policies. 524 F.3d 957, 960-64 (9th Cir. 2008). On September 9, 2008, the decision was amended to add a concurrence joined by Judges Fisher and Wardlaw. *Truth II*, 542 F.3d 634 (9th Cir. 2008) (Fisher, J., concurring). Appellant's Petition for Rehearing En Banc was denied November 17, 2008. Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc at 1, *Truth v. Kent Sch. Dist.*, No. 04-35876 (9th Cir. Dec. 22, 2008), 2008 WL 5273928. The Order denying rehearing en banc included an opinion dissenting from the denial of rehearing filed by Judge Bea, joined by Judge O'Scannlain, *id.* at 1-2 (Bea, J., dissenting), and an opinion concurring in the denial of rehearing filed by Judges Wardlaw and Fisher, *id.* at 1 (Wardlaw, J., concurring).

to limit its members and leaders to Christians. As in *Hsu*, the student group attempted several times to gain recognition before litigating, in this case, on the basis of its third proposed charter. That third charter would have required any member or officer to sign a "statement of faith."⁶⁴ The school district denied Truth's application as inconsistent with district policies and state statutes prohibiting discrimination based on creed or sexual orientation, among other identity categories. Although technically reconcilable with *Hsu*,⁶⁵ the sensibilities and tone of the *Truth* decision are markedly different.

In assessing the Equal Access Act claim, the Ninth Circuit in *Truth* found that the club's "requirement that members possess a 'true desire to . . . grow in a relationship with Jesus Christ' inherently excludes non-Christians."⁶⁶ Instead of recognizing that the exclusion Truth sought would be based on both religious identity and on religious belief, the court saw only identity: "The [School] District denied Truth [recognized] status, at least in part, based on its discriminatory membership criteria, not the religious 'content of the speech.'"⁶⁷

Incorrectly,⁶⁸ the Ninth Circuit panel in *Truth* found that the nondiscrimination policy was content neutral, like a time, place, and manner limitation.⁶⁹ Also incorrectly,⁷⁰ the Ninth Circuit suggested that Truth's goal of controlling its membership based on faith would constitute unprotected conduct, not speech.⁷¹ In other words, the Second Circuit in *Hsu* was divided in how far to extend the exclusionary rights of the Christian student club Walking on Water,

⁶⁴ *Truth II*, 542 F.3d at 639.

⁶⁵ The *Truth* court decided only the issue of Truth's proposed membership requirements, which it rejected, whereas the *Hsu* court addressed leadership positions, and in dicta dismissed any right to restrict membership based on Christian faith. See *id.* at 647 (distinguishing *Hsu*).

⁶⁶ *Id.* at 968; *Truth I*, 499 F.3d at 1009 (same language in original opinion).

⁶⁷ *Truth II*, 542 F.3d at 645. In its first opinion, the panel wrote that "[t]he District has denied Truth [Associated Student Body] status not because of the religious 'content of the speech,' but rather because of its discriminatory membership criteria." *Truth I*, 499 F.3d at 1009.

⁶⁸ See *infra* text accompanying notes 105-13.

⁶⁹ *Truth II*, 542 F.3d at 647; *Truth I*, 499 F.3d at 1010. To the contrary, the Second Circuit in *Hsu* determined that equal treatment for the faith-based group required that it be permitted to control leadership on the basis of conformity to its purpose. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 858-59 (2d Cir. 1996).

⁷⁰ See *infra* text accompanying notes 114-23.

⁷¹ *Truth II*, 542 F.3d at 647 (citing *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006)).

but the Ninth Circuit panel rejected any basis for the Christian group Truth to exclude non-Christians.

In the third and most recent version of the decision, two members of the *Truth* panel added a concurrence to amplify the First Amendment expressive association analysis and soundly reject Truth's First Amendment argument.⁷² Comparing expressive association rights in a limited public forum to more robust direct speech rights, the concurrence rejected Truth's First Amendment claim on grounds that the school district's policy was "viewpoint neutral and reasonable in light of the purpose served by the forum."⁷³ As discussed below,⁷⁴ in a limited public forum created to allow students to form groups on the basis of shared beliefs, preventing faith-based groups from using their beliefs to organize a group should not be dismissed as viewpoint neutrality.

C. Walker and Kane: The Law School Cases

In *Walker*,⁷⁵ the Seventh Circuit reversed the trial court's denial of a preliminary injunction requiring the law school at Southern Illinois University to recognize the CLS as a student group. The law school had denied the CLS recognition because it violated the school's nondiscrimination policies by excluding students who engage in unrepentant homosexual conduct. The CLS policy sits right in the muddled intersection of conduct and status: "CLS welcomes anyone to its meetings, but voting members and officers of the organization must subscribe to the statement of faith, meaning, among other things, that they must not engage in or approve of fornication, adultery, or homosexual conduct; or having done so, must repent of that conduct."⁷⁶ The CLS told the law school that "a person 'who may have engaged in homosexual conduct in the past but has repented of that conduct, or who has homosexual inclinations but does not engage in or affirm homosexual conduct, would not be prevented from serving as an officer or member.'"⁷⁷ The *Walker* majority parsed the distinction between conduct and status and found no violation of the law school's policy prohibiting discrimination on the basis of sexual orientation because "CLS requires its members and officers to adhere

⁷² *Truth II*, 542 F.3d at 651 (Fisher, J., concurring). Judge Fisher wrote the concurrence, which Judge Wardlaw joined. *Id.*

⁷³ *Id.* at 651.

⁷⁴ See *infra* text accompanying notes 105-13.

⁷⁵ 453 F.3d 853, 867 (2006).

⁷⁶ *Id.* at 858.

⁷⁷ *Id.*

to and conduct themselves in accordance with a belief system regarding standards of sexual conduct, but its membership requirements do not exclude members on the basis of sexual orientation.”⁷⁸

The *Walker* court based its analysis in large part on the conceptual separation of the CLS chapter’s expressive identity from that of the law school. Correctly,⁷⁹ the court explained that:

there is no support in the record for the proposition that CLS is an extension of SIU. CLS is a private speaker, albeit one receiving (until it was derecognized) the public benefits associated with recognized student organization status. But subsidized student organizations at public universities are engaged in private speech, not spreading state-endorsed messages.⁸⁰

Unfortunately, the *Walker* majority opinion is blind to the equality values at stake from the perspective of the law school. Not even acknowledging the nondiscrimination interest, the *Walker* majority asked, “[w]hat interest does SIU have in forcing CLS to accept members whose activities violate its creed other than eradicating or neutralizing particular beliefs contained in that creed? SIU has identified none.”⁸¹

Judge Harlington Wood dissented in *Walker*, showing skepticism toward the CLS as complete as the majority’s toward the law school. Judge Wood found that student organizations constitute educational opportunities within the meaning of the nondiscrimination policy. He also rejected the majority’s distinction between discrimination based on sexual orientation and discrimination based on sexual conduct, finding no evidence that the CLS actually applied its membership policy as it alleged.⁸² Judge Wood used *Lawrence v. Texas* to assert

⁷⁸ *Id.* at 860. Noting that the policy also prevents unrepentant heterosexual adulterers from becoming members, the court accepted the CLS’s argument that no one who engages in sexual relations outside of traditional marriage is eligible for membership or leadership. *See id.*

⁷⁹ *See infra* text accompanying notes 145-64.

⁸⁰ *Walker*, 453 F.3d at 861 (citing *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)). The *Walker* majority also argued that the Affirmative Action/Equal Employment Opportunity policy probably did not apply because membership in the CLS did not constitute an “education opportunity.” *Id.* at 860-61.

⁸¹ *Id.* at 863.

⁸² *Id.* at 873 (Wood, J., dissenting).

that the university would be entitled to ban discrimination based on either orientation or conduct.⁸³

Reminiscent of *Dale*, Judge Wood's treatment of the CLS statement of faith (prohibiting all non-repentant sex outside of marriage) improperly conflates status and ideology. Judge Wood argued that the CLS statement of faith violated the law school's nondiscrimination policy because "CLS would prevent a person who openly affirmed his or her right to engage in homosexual conduct, as part of an intimate relationship with another person, from serving as an officer or member of the organization."⁸⁴ In other words, Judge Wood equated exclusion of people who refuse to denounce their homosexuality with discrimination based on homosexuality. This is the flip side of the error perpetuated in *Dale*, in which the court permitted the Boy Scouts to equate the status of homosexuality with the ideology of being in favor of homosexuality.⁸⁵ Sexual orientation status, behavior, and ideology overlaps are inevitably challenging, with precious few bright lines of distinction, but we should recognize that one's attitude about one's own homosexuality, whether pride or self-denunciation, constitutes an ideology or belief that is separate from the sexual orientation status itself. The *Dale* court wrongly conflated the two to justify the Boy Scouts' policy of discrimination, and Judge Wood wrongly conflated the two to invalidate the CLS policy of exclusion based on behavior and attitude.⁸⁶ In short, the *Walker* majority applauded the CLS and dismissed the law school at every step, and the dissent came close to doing the opposite.

The polarization revealed in these opinions escalates with *Kane*,⁸⁷ the district court opinion in the Hastings College of Law case that shares the same sympathies as the *Walker* dissent. Indeed, the *Kane* statement of the issue broadcasts what the result will be:

⁸³ *Id.*

⁸⁴ *Id.* at 868-70. On this issue, Judge Wood bemoaned the lack of a record and suggested that a hearing would be needed to examine such questions as whether the CLS policy had been applied to heterosexual students who had engaged in sexual activities outside of marriage, or whether the CLS had admitted any non-sexually active gays. *Id.* at 869.

⁸⁵ See *supra* text accompanying note 37.

⁸⁶ Judge Wood pointed out that the CLS chapter constitution contains a nondiscrimination policy that conspicuously omits "sexual orientation" as a basis for protection, which he read as further evidence that the CLS policy was, indeed, a policy of discrimination based on status. *Walker*, 453 F.3d at 868 (Wood, J., dissenting).

⁸⁷ *Christian Legal Soc'y v. Kane*, No. C 04-04484JSW, 2006 U.S. Dist. LEXIS 27347, at *4 (N.D. Cal. Apr. 17, 2006).

This case concerns whether a religious student organization may compel a public university law school to fund its activities and to allow the group to use the school's name and facilities even though the organization admittedly discriminates in the selection of its members and officers on the basis of religion and sexual orientation.⁸⁸

This is noteworthy in part because the CLS chapter denies that it discriminates based on sexual orientation status; Hastings claims that the CLS does.⁸⁹

The district court in *Kane* first determined that the nondiscrimination policy targets conduct, not speech:

Akin to *Hurley*, *Roberts*, [*Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987)], and *Evans*, the Court finds that on its face, Hastings'[s] Nondiscrimination Policy targets conduct, i.e. discrimination, not speech. As in *Rumsfeld*, the Court finds that the Nondiscrimination Policy regulates conduct, not speech because it affects what CLS must *do* if it wants to become a registered student organization — not engage in discrimination — not what CLS may or may not *say* regarding its beliefs on non-orthodox Christianity or homosexuality.⁹⁰

The *Kane* court continued, "In contrast to *Hurley*, CLS is not excluding certain students who wish to make a particular statement, but rather, CLS is excluding all students who are lesbian, gay, bisexual, or not orthodox Christian."⁹¹ The court rejected the CLS's distinction between exclusions based on behavior and attitude rather than status:

Although CLS argues that it does not discriminate on the basis of sexual orientation, but merely excludes students who engage in or advocate homosexual conduct, this is a distinction without a difference. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) (rejecting attempt to distinguish statute discriminating against "homosexual conduct" from one discriminating on the basis of sexual orientation: "While it is

⁸⁸ *Id.*

⁸⁹ Brief of Appellee at 11, *Kane*, No. C 04-04484JSW.

⁹⁰ *Kane*, 2006 U.S. Dist. LEXIS 27347, at *23-24. Contrary to the court's analysis, the First Amendment protects a great deal that is "done" for expressive purposes, in addition to what is "said." See *infra* text accompanying notes 114-23.

⁹¹ *Kane*, 2006 U.S. Dist. LEXIS 227347, at *24.

true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the State] sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.”)⁹²

The *Kane* court’s analogy between the CLS statement of faith and the Texas anti-sodomy statute invalidated in *Lawrence* would be stronger if the CLS creed targeted only homosexual activity. Even so, the analogy fails to account for any First Amendment interests at stake in the expressive association context. Here, the CLS asserts that it seeks to exclude from membership all those who endorse homosexual conduct. Assuming the factual truth of these assertions — the CLS is excluding everyone, gay or straight, who approves of homosexuality, not just gay people — that is an ideology or belief that receives expressive association protection. *Dale*’s lack of precision between identity and belief invited this error, in the opposite direction, by using James Dale’s identity as a too-easy proxy for endorsement of homosexuality.

The *Kane* court next addressed the history of the CLS chapter at Hastings, noting that Hastings never interfered with the chapter’s existence until it refused to sign the nondiscrimination policy.⁹³ The record even reflects that, in its prior iteration, the group included one open lesbian.⁹⁴ From this evidence the court concluded, “[a]s long as the organization admitted all students who wanted to join, it was free to express any ideas or viewpoints. It was not until CLS refused to comply with the Nondiscrimination Policy that Hastings withheld recognition.”⁹⁵ But, to those who recognize the particular version of Christian morality espoused by the CLS as a protected belief, this history suggests two more troubling possibilities: first, that the group changed its defining beliefs; and second, that the public law school prefers the more inclusive Christianity of the earlier organization.

Turning to direct free speech analysis and the public forum question, the *Kane* court found that Hastings’s policy is viewpoint neutral.⁹⁶ The district court genuinely did not see any infringement

⁹² *Id.* at *24 n.2 (some citations omitted).

⁹³ *Id.* at *24-25.

⁹⁴ *Id.* at *73.

⁹⁵ *Id.*

⁹⁶ The court expounded:

CLS contends that Hastings engages in viewpoint discrimination because it prohibits CLS from using religion as a criteria for selecting members and

on the CLS's message or identity from forcing it to include people who endorsed sexual conduct outside of marriage: "Moreover, even assuming *arguendo* that Hastings'[s] condition for participation could be viewed as requiring CLS to admit gay, lesbian, and non-Christian students, CLS has not demonstrated that its ability to express its views would be significantly impaired by complying with such a requirement."⁹⁷

The *Kane* court distinguished *Dale* in part because Dale was himself a leader advocating for gay rights:

The broad class of students CLS seeks to exclude significantly differs from the Boy Scouts' conduct in *Dale*. CLS does not confine its desired discrimination to students who are open and honest about being gay, lesbian, or non-orthodox Christian, let alone leaders on campus advocating for gay rights or non-Christian faiths. Rather, CLS seeks to exclude *all* lesbian, gay, bisexual or non-orthodox Christian students. See [Boy Scouts of Am. v.] Dale, [530 U.S. 640,] 653 [(2000)] (finding that because Dale was open and honest about his sexual orientation and was a gay rights activist, his presence would force the Boy Scouts to send a message to its youth members and the world regarding homosexuality).⁹⁸

In this way, the *Kane* court dismissed the idea that abiding by the nondiscrimination policy would have any adverse impact on the CLS's ability to remain true to its statement of faith.⁹⁹

officers. CLS is confusing the appropriate analysis by focusing on the reasons CLS is acting, as opposed to the reasons underlying Hastings'[s] Nondiscrimination Policy. CLS also asserts that, as a religious group, it is unfairly disadvantaged. It argues that while other organizations, such as sports teams or political groups, may exclude students based on their athletic ability or political beliefs, CLS may not exclude the students of its choice. Again, CLS is confusing the analysis by focusing on the effect and the reason CLS is acting, as opposed to the reasons underlying Hastings'[s] conduct.

Id. at *40-41 (citations omitted).

⁹⁷ *Id.* at *67.

⁹⁸ *Id.* at *69-70 (some citations omitted).

⁹⁹ The court wondered, "[I]t is not clear how anyone at Hastings, other than the individual members and officers, would even be aware that CLS's members and officers are living their private lives in accordance with a certain code of conduct." *Id.* at *72.

Yet, there is no indication that the participation of such students made the organization any less Christian or hampered the organization's ability to express any particular message or belief. Nor is there any evidence that during those ten years students hostile to CLS's beliefs tried to overtake the

The polarization in these decisions is striking. *Dale's* dismissiveness toward the state's goal of equality for sexual minorities gave expressive association a bad name and made addressing these issues in a principled way much more difficult. Progressives' backlash reaction, urging the importance of equality for sexual minorities by minimizing the value of associational interests, is understandable but incorrect. Rather than erasing the central value of the expressive associational interests, the better analysis rehabilitates them along with the true equality interests at stake. That is the project of this Article.

II. FIRST AMENDMENT PROTECTION FOR EXCLUSIONARY STUDENT GROUPS

Public schools or universities may sponsor faith-based student organizations within the context of limited public forums of expressive associations.¹⁰⁰ Attracting members based on ideology or belief is inherent in the concept of a public forum of expressive associations, including those of student groups. Therefore, the better limited public forum analysis protects the group's exclusionary right when it is closely tied to the central purpose and identity of the student organization. The strongest doctrinal treatment rests on four fundamental points. First, forcing student organizations to abandon core membership criteria to conform to nondiscrimination policies is impermissible viewpoint discrimination.¹⁰¹ Second, limiting group membership to those who share the group's founding belief or ideology is expressive activity fully protected by the First Amendment, not unprotected conduct.¹⁰² Third, the fact that the public school or university provides material or symbolic support to student organizations within the school's limited public forum does not diminish the First Amendment protection within that forum.¹⁰³ Finally, distinguishing between status, belief, and behavior is often necessary.¹⁰⁴

organization or alter its views.

Id. at *73; cf. Shiffrin, *supra* note 12 (emphasizing internal meaning of ideology, rather than outward-directed message).

¹⁰⁰ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

¹⁰¹ See *infra* text accompanying notes 105-13.

¹⁰² See *infra* text accompanying notes 114-23.

¹⁰³ See *infra* text accompanying notes 124-34.

¹⁰⁴ See *infra* text accompanying notes 135-38.

A. *Enforcement of Nondiscrimination Policies Is Viewpoint
Discrimination when It Forces Student Groups to Abandon Core
Membership Criteria*

A public forum exists to create a diversity of perspectives and viewpoints. Expressive associations, by definition, are organized around particular perspectives or viewpoints. In *Roberts*, for example, the Court recognized that “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”¹⁰⁵ Freedom to associate “plainly presupposes a freedom not to associate.”¹⁰⁶ Thus, student organizations need ideological protection for membership and leadership.

To create a public forum that includes organizations whose organizing principle is religious belief and yet not permit those organizations to make distinctions based on that faith is almost incoherent. In other words, religion is an ideology (in addition to being an identity category), and preventing only religious organizations from constituting themselves based on their ideology is not neutral.¹⁰⁷ When viewed from the perspective of the faith-based organization, it is being subjected to a viewpoint-based limitation when it is forbidden from establishing itself on the basis of belief because its belief is religious.¹⁰⁸

Many who insist on enforcing nondiscrimination policies see religion as identity or status; many who assert the right of a religious group to control its membership based on faith view religion as a belief system. A religion is both and much more. Therefore, characterizing religion as either an identity or a belief does not answer the question of how to apply nondiscrimination policies to religious groups. Enforcement of nondiscrimination policies against religious student groups can be understood to be enforcement of a neutral policy, and, just as logically, to be viewpoint discrimination that singles out only religious groups. The better argument, however, is that denying only faith-based student groups the ability to require

¹⁰⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

¹⁰⁶ *Id.*; see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

¹⁰⁷ Cf. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 861-62 (1995) (denying funding of religious newspaper on Establishment Clause grounds in public forum constituted impermissible viewpoint discrimination).

¹⁰⁸ See William P. Marshall, *Discrimination and the Right of Association*, 81 Nw. U. L. REV. 68, 78-80, 90-91 (1986) (arguing that rather than allowing liberty and equality to compete at abstract levels, nondiscrimination should trump unless it would destroy viability of association).

conformity with core beliefs is viewpoint discrimination. Otherwise, the application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom. Protection of expressive association requires that discrimination based on belief be recognized and controlling, even when it also constitutes discrimination based on one's religious identity.

The Second Circuit in *Hsu* nicely recognized that "equal access" under the Equal Access Act does not mean uniformity. To the contrary, *Hsu* suggested that a "no hat" rule could deny Jewish students equal access for after-school religious purposes and a "shoes required" rule could compromise a yoga club:

The neutral application of the School's rules allows the School to say that it is treating all clubs equally. But exemptions from neutrally applicable rules that impede one or another club from expressing the beliefs that it was formed to express, may be required if a school is to provide "equal access."¹⁰⁹

Although the *Hsu* court was interpreting the Equal Access Act, the same understanding of contextualized, substantive equality should inform the concept of neutrality that is central in First Amendment analysis.

In rejecting the Southern Illinois University's position, the *Walker* majority described the law school's nondiscrimination policy as "viewpoint neutral on its face,"¹¹⁰ but suggested that there might be evidence that the policy had not been applied in a viewpoint neutral way. Specifically, the CLS alleged that the law school permitted other student groups to violate the nondiscrimination policy, such as by allowing the Muslim Student Association to limit membership to Muslims, and the Adventist Campus Ministries to limit itself to those "professing the Seventh Day Adventist Faith."¹¹¹

Conversely, in rejecting the student group's First Amendment claim, the Ninth Circuit concurrence in *Truth* emphasized that the school district set up only a limited public forum, and declared without analysis that the school district's restrictions based on its nondiscrimination policy were "viewpoint neutral and reasonable in light of the purpose served by the forum."¹¹² Similarly and

¹⁰⁹ *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 860 (2d Cir. 1996).

¹¹⁰ *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 866 (7th Cir. 2006).

¹¹¹ *Id.* Similarly, *Truth II* reversed and remanded for a determination whether the school district that denied recognition to the student group *Truth* had selectively enforced its nondiscrimination policies. *Truth II*, 542 F.3d 634, 648 (2006).

¹¹² *Truth II*, 542 F.3d at 651-52 (Fisher, J., concurring) (quoting *Rosenberger*, 515

unsurprisingly, as described above, the *Kane* court found the Hastings's nondiscrimination policy to be viewpoint neutral, even as applied, although the CLS pointed to the rules of other student organizations that limited membership based on interest or purpose.¹¹³

A deeper analysis leads to a conclusion contrary to the *Truth* and *Kane* courts' holdings. To summarize, courts and advocates cannot depend on decontextualized logic to determine the viewpoint discrimination issue, but rather must look at why religion is a protected category in nondiscrimination policies. Religion as identity is included along with other protected identities in nondiscrimination policies to protect religious faith. But that protected status effectively singles out religion as belief for uniquely unfavorable treatment when all non-faith-based beliefs (for example, vegetarianism, or advocacy for school spirit) are protected through club memberships, but faith-based groups are not. Therefore, courts should recognize that preventing only faith-based groups from using membership criteria to protect their expressive purposes is viewpoint discrimination.

B. Controlling One's Message Is Expressive Activity Protected by the First Amendment

The ACLU and school districts that prefer nondiscrimination policies to trump the expressive associational right of student organizations to control their groups' messages argue that discrimination is conduct, not speech.¹¹⁴ However, under *United States v. O'Brien*,¹¹⁵ controlling the ideological message of an expressive association is the very kind of conduct that requires First Amendment protection, because the governmental interest in preventing this control is directly related to the suppression of free expression.¹¹⁶ On this issue, too, the *Walker, Truth*,

U.S. at 829).

¹¹³ See *supra* note 96.

¹¹⁴ E.g., Brief for Am. Civil Liberties Union as Amicus Curiae Supporting Hastings College at 3, 18 n.8, *Kane*, No. C 04-04484 JSW.

¹¹⁵ 391 U.S. 367 (1968).

¹¹⁶ *O'Brien* set forth the test for First Amendment protection for conduct:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. But see Chemerinsky & Fisk, *supra* note 36, at 595, 601 (evaluating

and *Kane* opinions talk past each other. Each places the group's discriminatory control of message into either the conduct or the speech category, depending on whether the court sees the discrimination or the control of message.

The Sixth Circuit *Walker* majority recognized the significant impact that enforcement of the nondiscrimination policy would have on the CLS message. The court explained, "[o]ur next question is whether application of SIU's antidiscrimination policy to force inclusion of those who engage in or affirm homosexual conduct would significantly affect CLS's ability to express its disapproval of homosexual activity. To ask this question is very nearly to answer it."¹¹⁷ The court continued, "[t]here can be little doubt that requiring CLS to make this change would impair its ability to express disapproval of active homosexuality."¹¹⁸

The Ninth Circuit decision in *Truth*, however, rested in large part on the finding that the Christian high school group's desire to limit its membership to Christians constituted unprotected conduct. The Ninth Circuit drew from *Healy v. James*¹¹⁹ that the "Court did not condemn incidental infringements on the students' associational rights, so long as the school's reason for denying official recognition was 'directed at the organization's activities, rather than its philosophy.'"¹²⁰ Following *Healy* in calling for application of the *O'Brien* test, the Ninth Circuit dismissed the expressive issues:

discrimination as unprotected conduct under *O'Brien*).

¹¹⁷ *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 862 (7th Cir. 2006).

¹¹⁸ *Id.* at 863. The *Walker* court elaborated:

CLS is a faith-based organization. One of its beliefs is that sexual conduct outside of a traditional marriage is immoral. It would be difficult for CLS to sincerely and effectively convey a message of disapproval of certain types of conduct if, at the same time, it must accept members who engage in that conduct. CLS's beliefs about sexual morality are among its defining values; forcing it to accept as members those who engage in or approve of homosexual conduct would cause the group as it currently identifies itself to cease to exist. We have no difficulty concluding that SIU's application of its nondiscrimination policies in this way burdens CLS's ability to express its ideas.

Id.

¹¹⁹ 408 U.S. 169 (1972). *Healy* addressed First Amendment protections for student organizations in the context of university recognition of and subsidies for the student groups.

¹²⁰ *Truth I*, 499 F. 3d 999, 1016 (9th Cir. 2007) (quoting *Healy v. James*, 408 U.S. 169, 188 (1972)).

Truth has not established that its policy of excluding persons who do not share Christian values from its general membership has any expressive content, let alone that this policy communicates a message consistent with the views of the club's organizers. Truth has thus failed to show the required incidental infringement of a First Amendment interest.¹²¹

Similarly, the *Kane* district court relied heavily on *O'Brien* to categorize the CLS's discriminatory control of its membership as conduct, not speech. It also relied on *O'Brien* to find that:

the Nondiscrimination Policy furthers a governmental interest unrelated to the suppression of free expression — protecting students from discrimination. Furthermore . . . the facts [in *Kane*], including Hastings'[s] recognition of a predecessor of CLS for the previous ten years, confirm that Hastings'[s] Nondiscrimination Policy is directed at conduct related to the suppression of expression.¹²²

The *Kane* court also found the last prong of *O'Brien*, whether the government intrusion was no greater than necessary, to be easily satisfied by again categorizing what Hastings prevented as conduct, not speech. “[T]he [c]ourt notes that the Nondiscrimination Policy only targets the conduct of discrimination. As long as student groups do not exclude students based on the prohibited categories, the groups are free to express any beliefs or perspectives they choose.”¹²³

Discrimination based on identity generally is conduct without First Amendment protection unless, for example, the discrimination is a core aspect of the expressive identity of the organization. Controlling the ideological message of the association is expressive activity that should be protected by First Amendment principles, not simplistically rejected with the label “conduct.” The CLS's discriminatory membership practice of excluding all those who reject the CLS statement of faith, for example, is prohibited under nondiscrimination policies precisely because it makes distinctions based on ideology.

¹²¹ *Id.* at 1013. Expressing the same idea more successfully, Eugene Volokh argues that “antidiscrimination rules are content-neutral” in that the exclusion is “based on the groups’ conduct [of discrimination], not the groups’ ideas [that are the reason for the discrimination].” Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STAN. L. REV. 1919, 1930-31 (2006) (citing, among others, *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)).

¹²² *Christian Legal Soc’y v. Kane*, No. C 04-04484 JSW, 2006 U.S. Dist. LEXIS 27347, at *29-30 (N.D. Cal. Apr. 17, 2006).

¹²³ *Id.* at *31.

Discrimination based on ideology is almost pure speech, and goes to the heart of the ability of the expressive association to control its own message. Under *O'Brien*, preventing student groups from using ideological or faith-based criteria for membership is directly related to suppression of expression, and therefore should trigger First Amendment protection.

C. Student Groups Need Not Choose Between Recognition and the First Amendment

The fact that a public school or university provides material or symbolic support to student organizations within the school's limited public forum does not diminish those organizations' First Amendment protections within that forum. In an elegant treatment of this issue, Professor Eugene Volokh argues that a "No Duty to Subsidize Principle" means that a public university "may decide to make its classrooms and student group funds . . . available only for events at which people are welcome without regard to religion and sexual orientation"¹²⁴ and that universities can also decide to provide subsidies "only when the officers are chosen nondiscriminatorily."¹²⁵ However, Volokh's analysis uncharacteristically undervalues the expressive interests at stake, and overly relies on the theories of *Rust v. Sullivan*,¹²⁶ the closely divided reproductive rights funding case in which the Court found that government subsidies eviscerated First Amendment rights. *Rust* was not a public forum case, however. Having chosen to create a public forum,¹²⁷ a school or university cannot impose its own viewpoint or content-based rules on the student organizations. Rather than resting on *Rust*, the better analysis

¹²⁴ See Volokh, *supra* note 121, at 1926.

¹²⁵ *Id.* Volokh agrees that imposing nondiscrimination rules on student groups may not be good policy, because groups that discriminate can contribute to a "diversity of views" and "ought to be included within general benefit programs aimed at promoting such diversity." *Id.* at 1926-27.

¹²⁶ 500 U.S. 173 (1991).

¹²⁷ In *Hazelwood*, the court noted that,

The public schools do not possess all of the attributes of streets, parks, and other traditional public forums Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations.

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (citations omitted).

relies on *Healy*.¹²⁸ *Healy* recognized that schools and universities cannot ignore free speech rights of student groups simply because they are operating within a school or university context. The Court held that “denial of official recognition, without justification, to college organizations burdens or abridges that associational right.”¹²⁹ Indeed, *Healy* recognized that non-recognition of a student group constituted a prior restraint, and that a “‘heavy burden’ rests on the college to demonstrate the appropriateness of that action.”¹³⁰

Predictably, the *Walker* and *Kane* courts addressed this issue too with polar opposite analyses. In *Walker*, the Seventh Circuit used the public forum precedent of *Rosenberger v. Rector & Visitors of University of Virginia* and relied heavily on *Healy* to emphasize that subsidized student organizations in a public forum are private speakers.¹³¹ The court rejected the law school’s claim that rather than being a “forced inclusion” case, such as *Dale* or *Hurley*, this was a simple case of whether an association could benefit from institutional recognition.¹³² In contrast, Judge Wood’s dissent distinguished *Healy* and *Dale* because “CLS is trying to force an affiliation between itself and a state institution.”¹³³

Also predictably, the district court decision in *Kane* found that the context of university recognition limited any otherwise applicable First Amendment rights. The district court emphasized *Boy Scouts of America v. Wyman*,¹³⁴ in which the court upheld Connecticut’s policy of excluding the Boy Scouts from a workplace contribution program (a subsidy) because the Boy Scouts failed to abide by the program’s nondiscrimination policy. The court should have distinguished

¹²⁸ See *Healy v. James*, 408 U.S. 169 (1972).

¹²⁹ *Id.* at 181. The Court continued, “Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.” *Id.* at 183 (citations omitted).

¹³⁰ *Id.* at 184 (quoting *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931)).

¹³¹ See *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 860-61 (2006) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833-34 (1995)) (explaining difference between government funding of private groups to spread government-controlled message and government funding of private groups simply to encourage diversity of views from private speakers); see also *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229, 233 (2000).

¹³² See *Walker*, 453 F.3d at 864.

¹³³ *Id.* at 875 (Wood, J., dissenting). Judge Wood worried that student organizations that want to discriminate based on race should be required to sustain themselves without state support, “even if it could root such a membership policy in a religious text.” *Id.*

¹³⁴ *Boy Scouts of Am. v. Wyman*, 335 F.3d 80 (2d Cir. 2003).

Wyman, however, because it did not involve a public forum. The creation of a public forum protects strong expressive association rights, even in the school context.

D. Attention to the Interplay of Belief, Status, and Conduct Is Required

First Amendment expressive association rights protect a group's ability to control its message by controlling its membership. Thus, an expressive association's right to control its membership based on belief or ideology is a relatively easy case. As reflected in the varying approaches of the Second and Ninth Circuits in *Hsu* and *Truth*, religion adds some categorical confusion because it is both a protected belief and the prohibited exclusionary category of identity. Belief and identity also may implicate behavior. Describing someone as a Christian, or as gay, suggests something about identity, belief, and behavior. A question that divided the *Hsu* panel — whether some of the more secular or social activities of Walking on Water could be led by non-Christians — demonstrates the complex interplay between belief, identity, and behavior. The Hsus claimed that all activities of the Walking on Water club were meant to glorify Jesus Christ, and therefore all officers needed to be Christians.¹³⁵ From the position of that faith, planning a picnic for the glory of Jesus Christ is a different activity, resulting in a different picnic, than one planned for a different purpose.

The complexities of belief, identity, and behavior are even more central in the CLS litigation. First, of course, as with Walking on Water and *Truth*, the CLS litigation-backed drive to limit its membership to those who accept its statement of faith is itself faith-based activity. It is a statement that those members' faith must be lived, not simply considered. Just as the Hsus recognize a difference between a picnic planned for the glory of Jesus Christ and a picnic planned by a non-believer, the CLS sees a difference between a faith-based organization with shared commitments and an otherwise identical organization without the shared commitments.

A Vegetarian Caucus whose membership is bound by a pledge not to eat meat has a different identity and message than a Vegetarian Caucus without that pledge. If the CLS indeed exists in large part to address the question "what does it mean to be a Christian in law?," establishing specific behavioral and attitudinal requirements for membership and leadership appears central to the expressive identity of the organization.

¹³⁵ *Hsu v. Roslyn Union Free Sch. Dist.* No. 3, 85 F.3d 839, 857 (2d Cir. 1996).

The fact that the CLS shared commitment includes renunciation of certain sexual activity throws the CLS's litigation into the interlocking complexities related to belief, identity, and behavior of sexual orientation. In this context, exclusion on the basis of forbidden belief (that homosexuality is good) and exclusion on the basis of behavior (actively engaging in homosexuality) should be distinguished from exclusion on the basis of status or identity (being homosexual). Attention to those distinctions suggests that the CLS's exclusion of anyone who endorses sex outside of marriage is not discrimination based on sexual orientation.

Dale made this distinction harder to see by blurring the line between belief and identity, improperly using desire to discriminate as proof of belief. The *Dale* Court erred by deferring wholesale to the Boy Scouts' poorly supported claim that opposition to homosexuality was a core Boy Scout belief. First Amendment freedoms, however, do require some deference to the expressive association's self-definition. Judge Wood may be correct in his *Walker* dissent that a nondiscrimination policy protecting people who engage in certain behaviors may be necessary to defeat the CLS claim. However, such a nondiscrimination policy would be quite different from typical nondiscrimination policies, which generally focus on status rather than behavior. Judge Wood's willingness to move into that arena signals an admirable impulse to protect sexual minorities, but may not be equally protective of implicated First Amendment issues.

The CLS cases are especially complex because they combine exclusion based on religion, and exclusion based on sexual attitudes and conduct that are imbedded in the religious discrimination. As to the religious exclusion, discriminating against non-Christians is discriminating against an expressive category (people who do not believe in the group's defining faith) that is also an identity category (people who are the wrong religion). The belief defines the identity. The courts and parties that analyze these issues in polar opposite ways either see the discrimination as based on belief, which is permissible, or see the discrimination as based on identity, which is not. In fact, the discrimination is both. Protection of expressive association requires that the discrimination based on belief be recognized and controlling.

The sexual orientation issues also combine multiple aspects. The CLS claims that it is discriminating based on attitudes about sexuality.¹³⁶ The opposing law schools contend that what the CLS

¹³⁶ E.g., Reply Brief at 19-20, *Christian Legal Soc'y v. Kane*, No. C 04-04484 JSW (N.D. Cal. Apr. 17, 2006), 2006 U.S. Dist. LEXIS 27347.

calls discriminating against certain beliefs (endorsement of homosexuality) is the same thing as discriminating based on sexual orientation.¹³⁷ In terms of the impact on LGBT students and their allies, it probably is the same. Protection of expressive association principles, however, requires a finer analysis. If the CLS in fact does not impose its belief requirements regarding sexuality on heterosexuals as well as gay people, the law schools have the better of the argument. If the evidence establishes that the CLS applies its beliefs about the immorality of sexual conduct outside of marriage evenly to heterosexuals and gay people, as the CLS alleges, the conflict with a policy of nondiscrimination based on sexual orientation disappears, leaving only the conflict based on religion. With that simplification, the CLS cases can be understood as analytically equivalent to the high school cases of *Hsu* and *Truth*, again asking whether a policy against religious discrimination can be asserted against a faith-based student organization.

For First Amendment purposes, a membership policy requiring renunciation of homosexual activity is analytically distinct from discrimination based on sexual orientation. However, the very real harm to LGBT students and their allies in the educational institution cannot be so easily erased, and should not be minimized. The First Amendment requires protection of some hostile private speech, but it does not require institutional silence or neutrality on sexual orientation. An educational institution that professes to condemn discrimination against LGBT students should act affirmatively to ameliorate the hostile impact of anti-homosexual attitudes, whether expressed by student clubs that discriminate, student clubs that do not discriminate, or anyone else.¹³⁸

III. NO MEANINGFUL THEORY OF EQUALITY OR PRACTICE OF NONDISCRIMINATION IS AT STAKE

Equality and nondiscrimination are too precious to be reduced to the silly formalities of insisting that faith-based organizations cannot discriminate on the basis of faith. We do not really expect student organizations to ignore their defining purposes in selecting members and officers, and the pretense that we do is causing an unnecessary

¹³⁷ E.g., Brief of Appellees at 8-9, 9 n.8, *Kane*, No. C 04-04484 JSW.

¹³⁸ See, e.g., Chai Feldblum, SolomonResponse.Org, <http://www.law.georgetown.edu/solomon/smaterials.html> (last visited June 26, 2008) (providing examples of activities that institutions and students can undertake to protest and ameliorate presence of discriminatory employers on campus).

and harmful battle that pits equality for LGBT people against First Amendment rights of students.

Consider a student who votes for the Christian candidate to be the President of the Christian Student Association. The student believes the non-Christian candidate is generally more capable, but she thinks that a Christian should lead the Christian student organization. As a normative matter, nothing is wrong with that preference. It is neither immoral nor unjust, nor is it invidious discrimination.¹³⁹

Student organizations that do not object to formal nondiscrimination policies may in fact endorse positions regarding gender relations and sexual orientation that are highly offensive or discriminatory to other students, and perhaps directly contrary to the institution's nondiscrimination values. A conservative religious student organization that does not formally discriminate based on any protected status, may advance a substantive position regarding sex roles and sexual orientation that is directly contrary to a law school's commitment to equal opportunity for women and sexual minorities. The group's formal inclusive membership policy could be accompanied by a relentless pattern of heterosexual male leadership, antiwoman and anti-LGBT speakers, and a hostile atmosphere toward women and LGBT students. If nondiscrimination really only means formal policies of membership and leadership inclusion — even when accompanied by habits, patterns, policies, politics, and cultures of discrimination and exclusion — it does not mean much. Providing a law school's blessing, sanction, approval, or recognition to a group that actively promotes sex stereotypes and undermines LGBT rights simply because the group does not formally discriminate regarding membership or leadership promotes a watered-down notion of discrimination and equality.

Indeed, I fear that schools and universities may fetishize these formal nondiscrimination policies when applied against unpopular student organizations, while ignoring violations that are long-standing aspects of student life.¹⁴⁰ Hidden majoritarian premises and habits render the sex-segregated clubs and sports invisible, in spite of

¹³⁹ In *Hsu*, the Second Circuit recognized that the school district's argument that students could elect leadership based on religious affiliation would be simply hiding the same religious-based leadership determination behind student voting preferences, denying non-Christians the same opportunity to serve as leaders. 85 F.3d at 861.

¹⁴⁰ Cf. Kevin W. Saunders, *The Need for a Two (or More) Tiered First Amendment to Provide for the Protection of Children*, 79 CHI-KENT L. REV. 257, 273 (2004) (asserting that "the real harm" in *Tinker* was "attempt to squelch one side of a debate and only allow the expression of the other").

nondiscrimination policies explicitly including sex.¹⁴¹ For example, cheerleading squads, sports clubs, and service clubs routinely distinguish between boys and girls, or men and women.¹⁴² In *Truth*, for example, the court invalidated the Christian organization's ability to restrict membership based on commitment to Jesus Christ, but was initially untroubled by the sex-segregated Girls' and Men's Honor Clubs.¹⁴³ Perhaps similarly, in *Kane*, although many Hastings's student organizations have discriminatory defining interests in their bylaws, when considering less controversial groups Hastings interprets those references as "informational only."¹⁴⁴

Questioning the focus directed at formal nondiscrimination policies is consistent with substantive, antisubordination theories of equality. Context matters. Affirmative action is not the same as invidious discrimination. The hyper-attention to enforcement of equality claims that are not actually sought (the right of the Muslim or Jew or Buddhist to join and lead the CLS) shares some traits with a formalized, colorblind version of equality, in which formal niceties substitute for true equality. The formal right of everyone to join every student organization may be a distraction from more serious issues. Too much focus on facially correct, neutral regimes in educational institutions may foster an environment in which nobody notices that young women are subjected to catcalls in the corridors, or that no people of color are on the law review.

The main value of the institution's insistence that student organizations abide by nondiscrimination policies is symbolic: insisting that student organizations abide by institutional nondiscrimination policies is one way to send a message about the value that the institution places on equality, inclusivity, and welcome. Institutions can and should find ways to send equally or more meaningful messages of nondiscrimination and equality that do not suppress First Amendment association rights of student groups.

¹⁴¹ Cf. *Cuffley v. Mickes*, 208 F.3d 702, 711 (8th Cir. 2000) (stating KKK improperly excluded for discrimination where other discriminating groups allowed to receive government benefit).

¹⁴² See *Cuffley*, 208 F.3d at 711; see also Volokh, *supra* note 121, at 1968 n.185 (according to Volokh, "striking down the exclusion of the KKK from a generally available government program that purportedly excluded discriminating groups, because other less controversial discriminating groups — such as the Knights of Columbus — were not excluded").

¹⁴³ See *Truth I*, 499 F.3d 999, 1011-12 (9th Cir. 2007). Why not men and women, or boys and girls?

¹⁴⁴ Brief of Appellee at 4, *Christian Legal Soc'y v. Kane*, No. C 04-04484 JSW (N.D. Cal. Apr. 17, 2006), 2006 U.S. Dist. LEXIS 27347.

IV. SCHOOLS AND STUDENT GROUPS NEED SEPARATE EXPRESSIVE IDENTITIES

Conceptualizing the expressive identity of the institution as separate from the expressive identity of any individual student organization is an important step for both First Amendment and equality goals. Being more honest about the distinction between the speech of the school and the speech of student organizations is a better way to educate students about freedom. When the government sets up a limited public forum, the speech within the forum is private speech, not government speech. Conceptualizing student organizations as branches of the school and thereby bound by the school's nondiscrimination policy serves up a watered-down version of free expression and equality.

Recognizing and reinforcing that student organizations are private and separate from the school or university also helps to accommodate the current Establishment Clause doctrine related to religious student organizations, protect against the potential erosion of student speech in the name of conformity to school or university "mission," and bolster the expressive identity of the school or university.

A. Greater Separation Between Student Groups and Schools Can Protect Establishment Clause Values

A solid, relentless series of Supreme Court Establishment Clause decisions, including *Widmar v. Vincent*,¹⁴⁵ *Rosenberger*,¹⁴⁶ *Board of Education of Westside Community Schools v. Mergens*,¹⁴⁷ *Lamb's Chapel v. Center Moriches Union Free School District*,¹⁴⁸ and *Good News Club v. Milford Central School*,¹⁴⁹ has minimized Establishment Clause

¹⁴⁵ 454 U.S. 263 (1981).

¹⁴⁶ 515 U.S. 819 (1995).

¹⁴⁷ In *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) (plurality), the Supreme Court rejected an Establishment Clause challenge to the Equal Access Act, which creates a right of religious, political, and other kinds of noncurricular student organizations to exist at high schools. "To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion." *Id.* at 252. The Court did not reach the question whether the First Amendment requires the statutory free speech rights created by the Equal Access Act.

¹⁴⁸ 508 U.S. 384 (1993).

¹⁴⁹ 533 U.S. 98 (2001) (assuming, per Justice Thomas (rather than deciding), that after-school use policies constituted limited public forum, *id.* at 106; limited public forums can be limited in who gets access but "restriction must not discriminate against speech on the basis of viewpoint," *id.* at 106, and "the restriction must be

objections and allowed religious, proselytizing student organizations a place at public universities, colleges, high schools, and primary schools. Separationist arguments have been defeated, and the Court has now conclusively established that schools and universities that prohibit such religious organizations on Establishment Clause grounds are discriminating impermissibly against religion.

This Establishment Clause shift requires other doctrines and attitudes to adjust. Most clearly, the shift in Establishment Clause doctrine requires schools and universities to rethink their relationship and affiliation with student organizations. Specifically, it requires universities and schools to disengage, provide less oversight, and less of an imprimatur for student organizations that are recognized as part of a limited public forum. Separating the identity of the institution from the identity of the student group is necessary to accommodate this new, securely entrenched landscape that brings student religious organizations to every level of schoolhouse.¹⁵⁰ The presence of religious organizations requires schools and universities to address seriously the potential for endorsement in their relationships with religious student groups.

Strong arguments support an Establishment Clause jurisprudence that would keep all religious activity further away from public schools and universities.¹⁵¹ However, those arguments have not prevailed. Religious student organizations are now constitutionally protected at the elementary, secondary, and university levels. Therefore, values of

‘reasonable in light of the purpose served by the forum,’” *id.* at 107 (citation omitted); exclusion of religious group constituted impermissible viewpoint discrimination following *Rosenberger* and *Lamb’s Chapel*, *id.* at 107; “religion is the viewpoint from which ideas are conveyed,” rejecting distinction between worship and other activities, *id.* at 112 n.4).

¹⁵⁰ See, e.g., *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002). *Prince* concerned the attempts of an 11th grader, Tausha Prince, to get recognition for her Christian Bible club, called The World Changers, whose purposes included to “address issues of interest to students from a religious perspective” and “‘celebrating’ and ‘sharing’ the Gospel of Jesus Christ.” *Id.* at 1077. The specific issue in the case was whether the school district was complying with the Equal Access Act by setting up two tiers of students groups, relegating religious groups to a less favorable status. *Id.* The court found that the school district had violated the Equal Access Act and the First Amendment (because of viewpoint discrimination in denying access to the yearbook, A/V equipment, school supplies, and vehicles not covered by the Equal Access Act), although there was no right for the religious organization to operate during school hours during “student/staff time.” *Id.* at 1087-89 (discussing rationale for finding that religious organizations could not operate during school hours).

¹⁵¹ E.g., Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 195 (1992).

pluralism, freedom of association, and free speech are better served by acknowledging that when a school or university establishes a limited public forum for student organizations, the student organizations constitute private entities, with identities distinct and separate from that of the school or university.

Indeed, these Establishment Clause decisions rest on the understanding that student organizations' religious communication in a limited public forum constitutes "private" religious speech. For example, in rejecting any argument of coercion, Justice Scalia noted in his *Good News Club* concurrence that "so-called 'peer pressure,' if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected."¹⁵² A student group's speech will be more clearly "private" if the school does not attempt to impose its norms and values, including those about nondiscrimination.

This argument that student groups are engaging in "private speech" echoes Justice Marshall's admonishment in *Mergens*.¹⁵³ Marshall advised that holding the Equal Access Act permissible under the Establishment Clause required schools to disassociate more actively from the noncurricular student groups. The school at issue in *Mergens*, for example, created fora "dedicated to promoting fundamental values and citizenship as defined by the school. The Establishment Clause does not forbid the operation of the Act in such circumstances, but it does require schools to change their relationship to their fora so as to disassociate themselves effectively from religious clubs' speech."¹⁵⁴ The idea that religious student groups have values that are consistent with the public educational institution's own values is a pretense that risks public endorsement of the religious perspective. This reasoning is itself sufficient grounds for faith-based student organizations to be exempted from institutional nondiscrimination policies.

¹⁵² *Good News Club*, 533 U.S. at 121 (Scalia, J., concurring) (citations omitted). "What is at play here is not coercion, but the compulsion of ideas — and the private right to exert and receive that compulsion (or to have one's children receive it) is protected by the Free Speech and Free Exercise Clauses." *Id.* (citations omitted). "A priest has as much liberty to proselytize as a patriot." *Id.*

¹⁵³ 496 U.S. 226, 262 (1990) (Marshall, J., concurring).

¹⁵⁴ *Id.* at 262-63.

B. *Greater Separation Between Student Groups and Schools Protects Student Speech Rights*

Not surprisingly, the logic of current First Amendment doctrine related to student speech rests on how closely the student speech is tied to the institution's speech. Most prominently, for example, the concept of "school-sponsored" speech, which the Court understood as speech that "students, parents, and other members of the public might reasonably perceive to bear the imprimatur of the school,"¹⁵⁵ was determinative in *Hazelwood*. Proponents of robust free speech rights for students have an interest in delineating and emphasizing the separation of student speech from school or university speech. Extending the school's nondiscrimination policy to student organizations blurs their independent identities.

Morse also suggests the pragmatic imperative of separating students' speech from the policy or mission of the school or university. *Morse* reaffirmed the centrality of the question whether the school apparently endorses "school-sponsored" speech, but found that the school was not reasonably appearing to endorse the "BONG HiTS 4 JESUS" banner in question.¹⁵⁶ In *Morse*, the Court did not accept the invitation to permit school officials to censor speech interfering with the school's "educational mission,"¹⁵⁷ but its apparent willingness to subsume students' First Amendment rights into a vague notion of school policy is troubling.¹⁵⁸ The *Morse* Court recognized prevention of drug abuse as an important, perhaps compelling governmental purpose.¹⁵⁹ Equally important, *Morse* emphasized that the school had an established policy against illegal drug use. Therefore, *Morse* can be criticized as permitting the censorship of student speech because it was expressing a viewpoint contrary to the viewpoint of the school, even without any apparent endorsement problem.

¹⁵⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

¹⁵⁶ "*Kuhlmeier* does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Morse v. Frederick*, 127 S. Ct. 2618, 2627 (2007). In other words, *Morse* does not rest on an endorsement theory. Other than its troubling hints that student speech can be censored if it is contrary to official school policy, *Morse* has little relevance to this question.

¹⁵⁷ *Id.* at 2637.

¹⁵⁸ A student group formed to engage in illegal drug use can be prohibited even without *Morse*. That is the kind of conduct vs. speech distinction that makes sense. Or, imagine a student organization formed to promote the idea of illegal drug use. Or using Justice Stevens's turn, imagine a student group formed to advocate legalizing marijuana bong hits, whether or not for Jesus. *Morse* surely does not carve out some sort of exception for drug-related student organizations.

¹⁵⁹ *Morse*, 127 S. Ct. at 2628.

In addition to minimizing the political aspect of the message (how can “BONG HiTS 4 JESUS” be both advocating drug use and not be political speech?), the *Morse* Court seemed to be reinforcing a preferred unity between the viewpoint of the school and the viewpoint of the student speaker. A continuing preference for that unity would eviscerate student speech protection. Enforcing a unity between the nondiscrimination policy of a school and the nondiscrimination policy of a student organization would be consistent with this preference for unification of viewpoint. The potential unification of institutional and student viewpoints is even more wrong in the context of a limited public forum.

C. *Greater Separation Between Student Groups and Schools Protects Institutional Expressive Association Interests*

Separation of the message of the school or university from the message of the student organization enhances the power of the school's message where it has a message (e.g., nondiscrimination) and enhances the perceived and actual neutrality when the school is appropriately neutral. In *Rumsfeld v. FAIR*,¹⁶⁰ the Court had trouble seeing the expressive interests of law schools. The Court rejected the law schools' argument that the Solomon Amendment impermissibly coerced the law schools to violate their own policies of nondiscrimination, thereby impermissibly changing the law schools' expressive identity. The *FAIR* Court said that military recruiters “come onto campus for the limited purpose of trying to hire students — not to become members of the school's expressive association.”¹⁶¹ The content of the school or university's own expressive association will become clearer if it is not muddled with the multitude of messages of the student groups that it facilitates through its establishment of a public forum.¹⁶²

In his dissent in *Walker*, Judge Wood worried that:

the indirect impact of CLS's recognition of a student group maintaining such a policy is that [the law school], intentionally or not, may be seen as tolerating such discrimination. Given that universities have a compelling

¹⁶⁰ See *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006).

¹⁶¹ *Id.* at 69.

¹⁶² See also the court's recognition that Georgetown University has an interest in not being associated with pro-gay positions in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 39 (D.C. 1987).

interest in obtaining diverse student bodies, requiring a university to include exclusionary groups might undermine their ability to attain such diversity.¹⁶³

Judge Wood concluded by using *FAIR*, suggesting that the CLS “is trying to force SIU’s Law School to accept a ‘member’ (that is, a *recognized* student organization) that SIU does not desire. The whole point of this litigation is to transform CLS from an outsider, like the military recruiters in *FAIR*, into an insider.”¹⁶⁴ Whether or not it admits non-Christian members, no Christian group should have “insider” status in a public institution. Conceptualizing the expressive identities of the institution and the student group as having very distinct voices would better address Judge Wood’s concern about the blurring of the two.

In short, a renewed emphasis on the distinction between the school or university as speaker, and the student organization as speaker, should enable a stronger institutional viewpoint. The student organization can be religious, political, or otherwise ideological. The public school or university cannot have a religious perspective, but it can have a strong position on nondiscrimination, even when some student organizations do not. Indeed, the institution’s viewpoint that LGBT students are full members of the high school or law school community arguably would be diminished if it appears to embrace ideologically antihomosexuality student organizations, requiring only that they agree to abide by formal nondiscrimination policies.

V. LIMITING PRINCIPLES AND IMPLEMENTATION ISSUES

Public forums set up by schools and universities for student expression are relatively rare and precious free speech zones. Permitting even exclusionary student expressive associations to flourish does not need to lead to either the evisceration of institutional nondiscrimination policies or creation of hostile educational environments. However, limiting principles are necessary to make sure this is so.

¹⁶³ *Christian Legal Soc’y v. Walker*, 453 F.3d 853, 875 (7th Cir. 2006) (Wood, J., dissenting).

¹⁶⁴ *Id.* at 876.

A. Rights of Exclusion Should Be Limited to Student Expressive Associations Within a Public Forum Whose Core Identity Requires the Exclusion

The expressive association freedom to control membership should be limited to constraints on membership and leadership that are central to the mission and belief structure of the organization. In other words, the chess club defines itself by interest in chess, not by religious faith. Of course, there could be a Christian Chess Club.

The Board of Regents of the University of California argued in its brief in *Kane* that exemption from nondiscrimination policies for student organizations would be no different from a guest lecturer limiting his or her students to those of a specific race or religion.¹⁶⁵ The example is inapposite, however. The lecturer is presenting a program on behalf of the institution, whose own policies of inclusiveness should apply. The group that gathers to hear a guest lecturer has no expressive association interests protected by the First Amendment. Thus, the school or university has the ability to require open attendance at a lecture. Recognizing the core association rights of expressive student groups to control their own membership or leadership criteria does not require abandonment of institutional control in any other area. It does not even require any change in policies that student group meetings be open to all students.

B. Rights of Exclusion Should Be Limited to Membership and Leadership of the Student Organization, Not Necessarily Attendance at Meetings

First Amendment protection for exclusionary membership and leadership requirements does not similarly mandate that a student group may restrict attendance at its events and meetings. Leaders and members have control over the agenda and conduct of a meeting or event, but the same principles of autonomy over message do not support exclusionary policies regarding mere presence. Therefore, in creating a public forum of student groups, the school or university may limit the organizations' membership and leadership to students, and may require that general meetings and events be open to all students.

¹⁶⁵ Brief for the Board of Regents as Amicus Curiae Supporting Hastings at 3, *Christian Legal Soc'y v. Kane*, No. C 04-04484 JSW (N.D. Cal. Apr. 17, 2006), 2006 U.S. Dist. LEXIS 27347.

C. *Rights of Exclusion Should Not Carry Over to Student Groups' Commercial Activities*

The First Amendment offers less protection for expressive associations whose exclusionary policies undermine economic opportunities for those who are excluded.¹⁶⁶ Therefore, the CLS would have no right to conduct a members-only job fair, for example. Similarly, Professor Volokh notes that exclusion from student groups is not likely to cause systematic harm such as depriving someone of an education, livelihood, or shelter.¹⁶⁷

D. *Institutional Prohibitions on Harassment Would Continue in Full Force Within the School or University*

Exclusion from a private student organization is not the same thing as targeted harassment. Protecting student safety and freedom from harassment will continue to be an important aspect of school or university culture and duty. In fact, separating the expressive identity of the institution from the expressive identity of the student organization may free the institution to adopt strong protections, such as for students who are sexual minorities, beyond those required by statute.

E. *Tinker's Limitation for Disruptive Activity Applies*

Under *Tinker*, student expressive associations have no right to conduct their affairs in ways that "materially and substantially disrupt the work and discipline of the school."¹⁶⁸ The principles limiting the power of heckler's vetoes should assure that opponents of the exclusionary student group would not be able to shut it down through disruptive activities.¹⁶⁹ However, the *Tinker* requirement would also apply with full force to disruptive activities by the student

¹⁶⁶ See, e.g., *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 18-20 (1988) (O'Connor, J., concurring) (holding that predominantly commercial organizations are not entitled to First Amendment association right to be free from antidiscrimination provisions); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing compelling governmental interest in ensuring that women have equal access to business contacts); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 631, 634 (1984) (O'Connor, J., concurring) (emphasizing minimal constitutional protection for commercial association).

¹⁶⁷ See Volokh, *supra* note 121, at 1927.

¹⁶⁸ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); see also *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Tinker*, 393 U.S. at 513).

¹⁶⁹ See *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003).

organization itself. For example, the *Hsu* court suggested that if the club were reduced to squabbling, rather than becoming entangled with questions of religious worthiness, the school could disband the club under the “materially disruptive” test of *Tinker*.¹⁷⁰

F. Exclusionary Student Groups Should Be Required to Disclose Their Exclusionary Policies

Although purely private expressive associations enjoy rights of privacy about information like membership lists,¹⁷¹ expressive associations in the public school or university public forum do not have such rights. Institutions can condition recognition of any student group on that group’s disclosure and announcement of membership and leadership policies. Student groups wishing to discriminate should be required to announce the basis of their discriminatory policy.¹⁷² Being forced to announce one’s exclusionary principles could inhibit those principles from taking hold, with the requirement of articulation operating as a moderating influence.¹⁷³ Moreover, perhaps in many ways excluded students benefit from knowing the hostile attitudes of their fellow students, rather than having them hidden under a very thin veneer of state-imposed pseudo-respect, such as within pockets of political support for LGBT rights.¹⁷⁴

G. Parental Permission Slips Could Be Required for Student Organizations That Are Not Open to All Students

Depending on the age of the students, schools could require parental permission slips for all student organizations, or for any that have exclusionary policies. In *Good News Club*, Justice Thomas found no Establishment Clause violation in part because “the Club’s meetings were held after school hours, not sponsored by the school,

¹⁷⁰ *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 867 (2d Cir. 1996).

¹⁷¹ See *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (recognizing associational and speech rights not to disclose membership lists).

¹⁷² See Jennifer Gerarda Brown, *Facilitating Boycotts of Discriminatory Organizations Through an Informed Association Statute*, 87 MINN. L. REV. 481, 496 (2002).

¹⁷³ See, e.g., Shiffrin, *supra* note 12, at 848 n.35 (“[T]he implicit requirement that one must articulate clearly a bigoted message in order to retain the ability to exclude unwanted members for bigoted reasons may serve as a disincentive to discriminate for those groups who wish to forswear a reputation of bigotry.”).

¹⁷⁴ Regarding the faux-equality of imposing nondiscriminatory membership requirements, *id.* at 878 (“Forced methods of generating culture suffer authenticity problems that undercut its value.”).

and open to any student who obtained parental consent, not just to Club Members.¹⁷⁵ Justice Thomas claimed that the required parental permission means that any coercion would be of the parents, not of the elementary school children.¹⁷⁶ Whatever the strength of Justice Thomas's coercion analysis in *Good News Club*, parental permission slips could moderate the potentially disruptive or hostile impact of exclusionary student organizations.

H. *If Any Group Came to "Dominate the Forum," the First Amendment Right to Exclude Would Evaporate Along with the Public Forum*

In general, the answer to exclusionary student groups is more student groups.¹⁷⁷ If any single student organization became so big that it "dominated the forum," the public forum would have disappeared and the independence of the student organization from the school or university would have been destroyed.¹⁷⁸ In that case, the dominant student organization would no longer be private and independent, and would lose any expressive association right to control membership.

I. *The School or University Should Disclaim Any Control over Student Organizations' Exclusionary Policies*

The school or university can provide specific disclaimers that explain the constitutional rights of expressive associations and alert everyone that student organizations are not within the general nondiscrimination

¹⁷⁵ *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 113 (2001).

¹⁷⁶ *Id.* at 115.

¹⁷⁷ See Shiffrin, *supra* note 12, at 878 (explaining that "the excluded have the viable option to generate robust associations of their own and to create their own sites of culture and mutual recognition and trust," but noting that "[t]hese alternatives may . . . lack the social cachet of, and social power wielded by, majority, mainstream groups").

¹⁷⁸ *Good News Club*, 533 U.S. at 127-28 (Breyer, J., concurring) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part and concurring in judgment)). Justice Breyer's concurrence in *Good News Club* emphasizes the procedural posture (reversal of grant of summary judgment for school district) and suggests that certain facts, "[t]he time of day, the age of the children . . . and other specific circumstances are relevant in helping to determine whether, in fact, the Club 'so dominates' the 'forum' that, in the children's minds, 'a formal policy of equal access is transformed into a demonstration of approval.'" *Id.* at 128; e.g., *id.* at 134, 140 (Souter, J., dissenting) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 851 (1995) (O'Connor, J., concurring); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (noting that Establishment Clause did not bar religious student group from using public university's meeting space for worship as well as discussion)).

policies for access to educational opportunities.¹⁷⁹ Such disclaimers can minimize any apparent endorsement of discrimination.

J. School Officials with Younger Students Have Greater Leeway to Control Student Organizations

Although the general principles that I have described are applicable to both high school and university students, the specific implementation can differ because high school students do not necessarily have the full First Amendment rights of university students and adults.¹⁸⁰ The age of the students in question, whether in grade school, high school, or university, can determine the depth of First Amendment protections required.¹⁸¹ More infringements may be justified at the elementary than at the high school level, and more at the high school than at the university level.¹⁸²

CONCLUSION

The oppression of and discrimination against LGBT youth in many schools and communities should not be minimized. Interpreting the First Amendment rights of student expressive associations to extend to exclusionary practices may cause harm to the excluded students. Freedom of speech causes harm. Pornography causes harm, as does

¹⁷⁹ In *Widmar*, for example, the university published a student handbook with an explicit disclaimer that “the university’s name will not ‘be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members.’” *Good News Club*, 533 U.S. at 142 (Souter, J., dissenting) (quoting *Widmar v. Vincent*, 454 U.S. 263, 274 n. 14 (1981)).

¹⁸⁰ See, e.g., Shiffrin, *supra* note 12, at 880-87, 882 (arguing for right of associations to exclude “all presuppose an agent with life experience and at least the maturity age brings, one who has had opportunities to develop her autonomous capacities such that she may be reasonably thought to be responsible for the exercise of her autonomy”).

¹⁸¹ See *Good News Club*, 533 U.S. at 142-43 (Souter, J., dissenting) (noting “special protection required for those in the elementary grades in the school forum” (citing *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 n.69 (1989)). Justice Souter continues, “We have held the difference between college students and grade school pupils to be a ‘distinction [that] warrants a difference in constitutional results.’” *Id.* at 143 (quoting *Edwards v. Aguillard*, 482 U.S. 573, 584 n.5 (1987)).

¹⁸² See *id.* at 115 (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)) (“[S]ymbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.”); *Lee v. Weisman*, 505 U.S. 577, 592 (1992) (explaining that elementary children are more impressionable than older children).

other protected hate speech.¹⁸³ I am hopeful, though, that students who are harmed by exclusion from student organizations will take advantage of the same culture of free expression in multiple ways, whether by forming other organizations or through individual speech.

People who are discriminated against have a powerful ally in the First Amendment. The amazing importance of the Equal Access Act¹⁸⁴ for LGBT youth, and for LGBT justice generally, provides an important lesson. Congress enacted the Equal Access Act to make high school safe for traditional religious groups, and it is doing that, sometimes to the detriment of LGBT youth. However, the equally big, perhaps even bigger beneficiary of the Equal Access Act is LGBT gay-straight alliances, of which there are now thousands in high schools across the country.¹⁸⁵ The widespread presence of those pro-gay student organizations has created safety for countless LGBT youth, and has changed public attitudes about LGBT justice. Overwhelming evidence shows that attitudes about homosexuality are significantly related to age, with younger adults consistently more supportive of strong freedom for sexual minorities.¹⁸⁶ This remarkable change in attitudes has been fueled in part by popular culture, and in part by the presence of organized LGBT organizations in high schools and colleges. Those organizations have been able to exist in places where dominant public opinion does not support LGBT freedom only because First Amendment freedoms have protected them. Thus, recent history shows that progressive change in the climate for LGBT people, especially youth, is fueled by free speech and expressive

¹⁸³ See Shiffrin, *supra* note 12, at 878 (explaining harms of exclusion “are a real, substantial cost of the protection of freedom of association, just as there are similar costs associated with other protected forms of expression that permit the voicing of hateful or ignorant sentiments”).

¹⁸⁴ 20 U.S.C. § 4071(a), (b) (2000). The Equal Access Act, passed in 1984, requires public secondary schools that permit any student-initiated non-curricular student group to allow other non-curricular student groups, however unpopular. 20 U.S.C. § 4071 (1984).

¹⁸⁵ See, e.g., *Straights & Gays for Equal. v. Osseo Area Schs.*, 471 F.3d 908 (8th Cir. 2006) (upholding right of Gay Straight Alliance pursuant to Equal Access Act); *White County High Sch. Peers v. White County Sch. Dist.*, 2:06-CV-29-WCO, 2006 U.S. Dist. LEXIS 47955 (N.D. Ga. July 14, 2006) (same); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003) (same).

¹⁸⁶ E.g., *THE HARRIS POLL #91*, Sept. 18, 2007 (explaining that 49% of those ages 18 to 35 support gay rights, compared to 37% of those ages 43 to 61 and 31% of those 62 and older); *Tolerance for Gay Rights at High-Water Mark*, GALLUP POLL, May 29, 2007 (noting that 75% of ages 18 to 34 agreed that homosexuality is “acceptable alternative lifestyle” compared to 45% of ages 55 and above).

association rights. That is the lesson in freedom and equality that we should be teaching our students.